Juristic Techniques in the Supreme Court of India (1950-1971)

in some selected areas of Public and Personal Law

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CHAPTER II

Abstract of the Thesis

This thesis is about the decision-making habits of the Indian Judge and in particular the judges who served in the Supreme Court of India from 1950 to 1971. The approach adopted has been to consider the predicament of the lawyer and the judge in India in the last two decades, sketch the background of the Indian Supreme Court judges (Chapter I) and briefly survey the manner in which Indian judges have interpreted and adapted the juristic techniques inherited from the British to suit Indian needs (Chapter II).

The question posed in these earlier chapters is : "Do Indian judges - the Supreme Court being used as a model - deciding complicated issues of law and fact, rely solely on their western training or do they also receive theoretical inspiration, instinctive or otherwise, from indigenous sources ?"

The technique followed has been not to try to analyse each one of the five thousand odd reported cases decided by the Supreme Court since 1950, but to select certain branches of Public and Personal law, attempt to show the techniques used as well as the sources relied on by the judges and contrast their actual performance against the options and possibilities open to the Court.

The areas concentrated on are : the constitutional rights to property (Chapter III); preventive detention and public order (Chapter IV); the Hindu joint family (Chapter V); the pious obligation of a Hindu son to pay his father's debts, the legal incidences attendant to the adoption of a Hindu son, and the property rights of Hindu Women (Chapter VI); "Obscenity", Contempt of Court, Official Secrecy, cow slaughter and religious rights and certain aspects of labour law (Chapter VII). The last Chapter attempts to answer the problem posed at the beginning of the thesis.

Acknowledgements

It is always a difficult task to try to make up one's mind whom to thank first. In my case my first responsibility (and indeed this is my first opportunity) is to thank Professor J. D. M. Derrett who supervised this thesis and guided my work through the many pitfalls that a work of this nature must inevitably encounter. Equally I must thank Mr. S. S. Dhavan (now a member of the Law Commission of India) who urged me to take up this research in the first place, constantly supplied me with information and material and drew on his own experience as a Judge of the Allahabad High Court to give me a closer look at the decision-making habits of the Indian Judge. Mr. S. M. Sikri (now Chief Justice of India) was kind enough to supply the bulk of the information contained in Appendix II and Mr. M. H. Beg (now a puisne Judge of the Supreme Court of India) was kind enough to write to me in answer to certain queries I had raised about some judgements he had delivered as a Judge of the High Court at Allahabad. I am also grateful to the following for the help that they have rendered to me from time to time : Professor G. W. Keeton, who discussed some juristic problems with me; Professor J. N. D. Anderson, who discussed some Personal law problems with me; Mr. T. K. K. Iyer, who was kind enough to read and comment on Chapters III and IV and parts of Chapter VII; Miss Ena Ritson-Hall for general comments; Dr. Helen Kanitkar; Mr. Peter Colvin; Mr. M. Robinson; Mr. B. Mahanti; and the library staff of the School of Oriental and Africah Studies, the Institute of Advanced Legal Studies and the Middle Temple.

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thesis typed and bound. Special mention must be made of Mrs. Varya Crichton, who not only allowed me to live in her flat free of charge but also financed a good part of my stay in England and this research. Indeed without her help and support this thesis might never have been written.

Lastly, I must thank Jenny Goodliffe, who in typing the thesis from my shocking drafts, exceeded the obligation she had either contracted or bargained for.

Notes on Abbreviations.

The standard references are used for Law Reports and legal Journals. Other abbrevications emerge from the text of the thesis itself, where the formula " ... hereafter referred to as ... " (or " ... hereafter ... ") is used.

Amongst the unusual references the following are to be noted :

Derrett : I.M.H.L. (1963)	refers to J. D. M. Derrett's Introduction to Modern Hindu Law (1963)
Derrett : C.M.H.L. (1970)	refers to J. D. M. Derrett's Critique of Modern Hindu Law (1970)
Mayne (11d.)	refers to J. D. Mayne's Hindu law and Usage (11th Edition 1951)
Mulla (13d)	refers to D. F. Mulla's Principles of Hindu law (13th Edition 1966)
Seervai (1967)	refers to H. M. Seervai's Constitutional law of India (1967)
Z.V.R.	refers to Zeitschrift fuer vergleichende Rechtswissen schaft

Note: The books are usually referred to either by their name and date or the name, the date and then the place of publication. This form has however been changed in the Bibliography where the usual library practice of name of book, place of publication and then date, is followed.

CHAPTER I

THE SUPREME COURT JUDGE - BACKGROUND AND VOTING BEHAVIOUR

1. The Broad Problem

This thesis attempts to identify and analyse some of the judicial techniques used by the Supreme Court while applying Common Law methods inherited from pre-Independence India.

The most obvious problem that the Court faces is to evolve a workable relation between the Common Law, which has its own peculiar western background, and Indian ways of life and thought. A western jurist sums it up :

> "There is a pattern of western law first introduced by the rulers of British India, and now enshrined in a written Constitution which expounds, in language inherited from Locke, the doctrine of individual liberty. This represents, though probably as yet much more superficially, another kind of living law in Indian society. It is obvious therefore that the positive law of India must represent a kind of ferment between these two historically and culturally opposed social forces. In a society with a relatively homogeneous cultural tradition it may still be possible for judges to assert that they are not concerned with the policy of law but merely to state what the law is and to apply it, for here the ideological factors remain concealed and merely implicit for the most part. But in the context of present day India, it is hardly possible for the judiciary, even if trained in (the West) ... in the most vigorous standards of legal positivism, to adopt this detached attitude without, by their very decision making it all too apparent how empty a formula this is." 1

To what extent have the lawyers and the courts succeeded in avoiding an indelicate confounding of borrowed concepts with indigenous life ?

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1. Denis Lloyd: The idea of law (1964) 220. For a typical account of such detached empty formulas see Prof. K. Bentsi-Enchill: Institutional challenges of our time, reprinted Daily Graphic (Accra, Ghana) Wednesday, March 10, 1971.

A West Indian traveller to India felt compelled to remark on the "craze for foreign things" suffered by his hostess in Delhi.[2] This is hardly peculiar to Indians. It is the by-product of a consumer society and limited, as one patient sympathetic observer has shown, to metropolitan areas.[3] The lawyer, a metropolitan creature, is a natural victim caught like many other such "marginal men"[4] and "intellectuals" in what has been called the gulf "between tradition and modernity", and has been criticised for going one step further, and looking solely to the West for his ideas.[5] This view has been endorsed by at least one High Court judge who regrets "the lack of indigenous theoretical nourishment" and the fact that Macaulay's Minute on Education made Indians become mere collectors of quotations.[6]

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2. V.S.Naipaul: An Area of Darkness (1964 Andre Deutsch), 90.

3. Maurice Carstairs: The Twice born (1961) 141-2.

4. The phrase is from E.V.Stonequist: The Marginal Man (N.Y. 1961) a world wide study of the problem.

5. See generally Edvard Shils: The intellectual between tradition and modernity (1961). It is provocative though with too many generalisations. A useful indication may be gained from the various studies on Indian students abroad (as these resemble the situation of the judge much more) on which see Mrs. Helen Kanitkar: The social organisation of Indian students in the London area (submitted as a Ph.D. dissertation London 1972); J.Useem and R.H.Useem: The western educated man in India (1955 N.Y.); Amar K.Singh: The impact of foreign study on the Indian experience (1962) I Minerva 43-53; R.E.Park and H.A.Miller: Old world Traits transplanted (Harper, London and N.Y. 1921). For an early account see P.K.Narayan: The conflict of cultures in India (1922) 45 Hindustan Rev. 502-503; K.M.Munshi: As I look back - the changing social patterns (1963) 25 Journal of the Gujerat Research Society, 278-284.

6. S.S.Dhavan in a series of 5 lectures to the National Academy at Mussorie (1962) since then published as separate pamphlets. See esp. Indian jurisprudence and the theory of state in Ancient India, 1-3. This view is expounded again in a lecture in Simla in November 1971 entitled "The legal system of Ancient India" (of which I have a transcript). All these were commented on by G.W.Keeton: How Ancient is Ancient law? (1971) Question. I am indebted to S.S.Dhavan for sending me a typescript of G.W.Keeton's article.

Prima facie this charge is true. Almost every commentator in any legal textbook insists on using western terminology, refusing to look at the practical local problems that a statute might create, and still relying on nineteenth century case law.[7] A leading commentator on the Constitution, proud that he was in the company of an Australian Chief Justice,[8] refused to take into account any political, social or economic factors in interpreting the Constitution; though happily he later changed his mind.[9] A Chief Justice of India discussing "Democracy in India" (emphasis mine) lectured on the Greek and Western approaches to the subject, with only a casual reference to Indian conditions.[10] A professor in Bombay claims to have founded what he calls the "synthetic school of Indian jurisprudence",[11] but despite the fact that Dean Pound blessed its claim to originality[12] - perhaps because of its reliance on Pound's ideas[13] - a foreign observer has rightly

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7. See for example J.D.Jain: The Indian Contract Act (1966), Allahabad; S.N.Shukla: The Transfer of Property Act (1964), Allahabad. See, as a recent example: S.S.H.Azmi: A comparative study of the law relating to consumer protection under Indian, British and American systems (1971) I.S.C.J. Jnl. 5-18.

8. Seervai: Constitutional Law of India (1967) Preface ix, quoting Latham C.J.

9. Seervai: The position of the judiciary in ancient India (1970) where he enters into an attack on Dicey and maintains that the shadow of Dicey should not be case on the process of interpretation in India. Contrast his attitude in "The Constitution and Judicial Power" Foundation Day address delivered on Sept. 4, 1964, reproduced in XXXIII Government Law College Magazine (1964-65) 24.

10. M.Hidayatullah: Democracy and the judicial process in India (1966) Chapter II, pp 31-57.

11. M.J.Sethna: Synthetic Jurisprudence (1959); The essentials of a legal system (1966).

12. Roscoe Pound: Synthetic Jurisprudence (1963) 61 Bom.L.R. Jnl. 8-11.

13. See ibid at 11 and Sethna: The essentials of a legal system (supra f.n.11) 14-18.

remarked "the result is more of an aggregate than a synthesis".[14] A former Attorney General reflected on the ambition of all Indian lawyers to achieve original, though western, standards of legalism, when at the end of two famous series of lectures, he was content with making the plea (or appeal):

> "With the overgrowing expansion of Indian legal thought, there is bound to be greater interplay between legal minds in India and elsewhere in the world of Anglo-Saxon jurisprudence. As judges and lawyers in India freely resort to English decisions, so may in the course of time, the English, ours." 15

only to be asked by two foreign observers: "Why should they ?"[16] The language of the Common Law has dominated and a brief look at any law journal will show this.[17] Indian jurists certainly feel the need to recognise this problem and try to find Indian referents for western labels. Thus a High Court judge insisted that the principle behind Section 11 of the Civil Procedure Code, 1908, should be described by the Sanskrit term Prāng Nyāya rather than the Latin res judicata.[18] One writer wrote unsubstantiated articles suggesting that the rule of law was really dharma[19] or

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14. D.F.Derham: Editor of Paton: Jurisprudence (1964: 3d) 3 (f.n.3).

15. M.C.Setalvad: The Common Law in India (1960) 227; The role of English Law in India (1966) 76. Note the obvious pleasure with which M.Arunachalam (in his article Lord Denning,M.R.(1964) 1 M.L.J. Jnl. 1 at 2) notes that in Exparte Soblen (1963) 2 Q.B. 243 at 301, the Indian case of Hans Muller v Supdt. Jail (1955) S.C.J. 324 was followed. He adds (at p.2) "This is a beautiful instance of judicial comity in recent years."

16. Derrett: Bk. review (1961) 10 I.C.L.Q. 206. M.Galanter Bk. review (1961) 10 Am.Jnl.Comp.L.292.

17. Some references are cited later.

18. S.S.Dhavan: In an unreported case cited to the author in a personal communication.

19. S.Varadarajulu Naidu: The rule of law as dharma (1961) II M.L.J. Jnl. 11-12.

karma[20] - a habit which at least one Chief Justice of India relished[21] and to which at least one foreign writer succumbed.[22] Yet another writer rightly complains that a book on legal history almost completely forgot about India's legal thought before the advent of the English.[23]

The problem is not one of emphasising past glory, alleged prior antiquity, or terminology. Many years ago, Dean Pound began telling American lawyers that their basic concepts of law were based on outmoded concepts of liberty,[24] were mechanical[25] and that they should give up the Common Law system of interpretation[26] in order to resurvey the social and other interests that they wanted to protect.[27] With him, other jurists examined the judicial process,[28] the

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20. S.Varadarajulu Naidu: The rule of law as karma (1960) I M.L.J. Jnl. 42

21. P.B.Gajendragadkar: casual references to dharma (1957) 59 Bom.L.R. Jnl. 4 at 6; message to Magna Carta Celebrations A.I.R. 1965 Jnl. at 73.

22. See for example Harrop, A Freeman: An introduction to Indian jurisprudence (1958) 8 Am.Jnl.Comp.Law 29.

23. Paras Diwan: Review of M.P.Jain: Outlines of Legal History (1967) 9 J.I.L.I. 265.

24. Roscoe Pound: Do we need a philosophy of law ? (1905) Col.L.R 265 ref. 339. On the contribution see Julius Stone: Law and society in the age of Roscoe Pound (1966) 1 Israel L.Rev. 173; E.W.Patterson: Roscoe Pound on jurisprudence (1960) 60 Col.L.Rev. 1124.

25. Roscoe Pound: Mechanical jurisprudence (1908) 8 Col.L.Rev. 605.

26. Roscoe Pound: Common Law and legislation (1907) 21 Har.L.Rev. 383.

27. For the best account of this see Roscoe Pound: Jurisprudence (1959) Vol. III generally; A survey of social interests (1943) 57 Har.L.Rev. 1.

28. Cardozo's classic work: The nature of the judicial process (1921) showing the importance of Philosophy (Lecture I), History (Lecture II), Sociology (Lecture III) and Precedent (Lecture IV) in the judicial process.

appellate tradition,[29] the lawyer's quest for certainty,[30] and attempted to overhaul the whole system. Many years later in the mid-sixties, jurists thought that sociological jurisprudence had been over-emphasised[31] and even in Pound's day an English professor had called his "jural postulates" the prejudices of a Nebraska local.[32] Indian judges have not forgotten what Pound said about the Common Law, but Indian jurists, as one Chief Justice of India pointed out, have rarely examined their judicial process.[33]

Indian judges have carefully avoided the mistakes they were warned against by American jurists, have quoted Pound,[34] and carefully guarded themselves, as Fazl Ali J. does at the end of his judgement in Gopalan v Madras,[35] from the charge that they are following nineteenth century Common Law ideas. They have therefore avoided America's mistakes, but have they solved India's problems ?

The criticism against the judicial process was well put in a recent exchange in Parliament :

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29. See particularly K.Llewellyn: The Common Law tradition (1960).

30. Frank: Law and the modern mind (1930). An uncanny Freudian interpretation but it exposes the lawyer's quest for certainty very well. He also analysed the judicial process of the lower courts in Courts on Trial (1949)

31. See Stone: f.n. 24 supra.

32. Laski: The American democracy (1949) 443

33. M.Hidayatullah: Preface to M.Imam: The Indian Supreme Court and the Constitution (1968).

34. See generally P.B.Gajendragadkar: Law, liberty and social justice (1964). See also S.D.Balsara: A humble tribute to Roscoe Pound (1964-65) XXXIII Govt.Law College Magazine (Bombay) 13 and note his almost uncritical acceptance of Pound's ideas.

35. A.I.R. 1950 SC 27 at pr. 96 p. 68 col. 1. For a good illustration of this attitude see Paras Diwan: Nationalisation under the Constitution (1953) S.C.J. Jnl.21.

> P. Ramamurti: 'We are not concerned with the position in the United States ... the Japanese ... (or) ... the Canadian Constitution(s) ... or the laws of England ... Instead of dealing with (the) specific subject (in the Constitution) these people (on the bench) go quoting Blackstone in his Commentaries on the law of England.'
>
> V. Nair: 'They might have learnt it by heart.'
>
> P. Ramamurti: 'It is (not) something which they have learnt (by heart) alone. It is something in their blood.' 36

And this takes us to the crux of the problem. Have our judges lost contact with Indian ways of life and thinking because of their western training and attitudes ? At its worst, the argument is, as a politician said of the Indian Civil Service, that they pretend that they are

> "some kind of superior Indian, not equal to the English, but a sort of brown Englishman in this country." 37

At its best, the criticism accuses the judge of insensitivity to India's needs and its way of living, and states - to borrow a comment Gandhi used about the Privy Council - that "on highly intricate matters of custom, in spite of all their labours, they have often made egregious blunders !" (emphasis mine).[38] The simple allegation of "black skin white masks"[39] which emanated from Franz Fanon and has become a fashionable part of the post-Imperial scene, will not

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36. Lok Sabha Debates (hereafter L.S.D.) IVth Series Vol.39, No. 39, col. 293. P.Ramamurti's whole speech is interesting.

37. L.S.D. IVth Series (1970) Vol.40, No. 42, col. 251 (per B.Ali Mirza).

38. Hindustan Times, Aug. 7, 1926, quoted G.H.Hadbois: Evolution of the Federal Court in India (1963) 5 J.I.L.I. 19 at 26.

39. Franz Fanon: Black Skin, White Masks (1967) Grove Press N.Y.), remains the locus classicus on the subject. But his analysis is too simplistic and rendered more so by Fanon's unguarded remarks about the sex problems that a colonial might face when lost in western metropolitan cities.

fully explain the judicial process in India and at least one foreign observer insists that all this westernism is really a blind :

> "My Indian brother," he remarks, "is not a brown Englishman. He is an Indian who has learnt to move around in my drawing-room and will move around in it as long as it suits himself for his own purposes. And when he adopts my ideas, he does so to suit himself, and for as long as it suits him." 40

It is unwise to go into the merits of the problem at this stage, but the problem of finding an "Indian Indian" solution to the problem rather than an "Indian Western" solution remains.[41]

For the present we will concentrate on trying to identify the pressures that post-Constitution India imposed on the lawyer and the judge. The Constitution with its tremendous scope for judicial review played no mean part in helping the lawyer and the judge to re-allocate to themselves a status, analogous to the one which they enjoyed in pre-Independent India. To the importance of this significant new dimension we now turn.

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40. Derrett: Tradition in Indian politics and society (unpublished paper S.O.A.S. Page 4, dated 17.3.69) due to be published in a book edited R.Moore in Australia. I am indebted to Professor Derrett for a copy of the article.

41. These phrases are used by Derrett in his book review of Setalvad's The Common Law in India (1960)(1961)10 I.C.L.Q. 206.

2. The Lawyer

After Independence the lawyer experienced a decided decline in his social and political status. The Constitution had assigned to him no constructive role: the hey-day of mass agitation and the lawyer politician was over. The Bar Association of one High Court passed the following resolution :

> "Resolved that this conference protests against the growing tendency in responsible ministerial cirles to undermine the profession of law and lawyers and to belittle the part played by them in the National struggle. Lawyers have played no unworthy part in the prolonged National struggle and they have been pioneers in the fight for freedom. This conference affirms that law is an honourable profession and that for the good government of any country, lawyers are absolutely necessary." 1

Six years later a prolific contributor to legal journals remarked :

> "Talking of the legal profession one may frankly state that the services of its members (in) the national struggle and in the early building up of the National Congress has been rather too soon forgotten. They are needlessly maligned by political Cromwells as 'Parasites of Society' and 'interrupters of Justice'. A true and keen student of public affairs will see that the lawyer is a very useful instrument in the apparatus of Justice." 2

The Attorney General while not willing to admit a decline in standards to the Uttar Pradesh bar[3] - perhaps because of their sensitivity to criticism as their resolution shows[4] - freely did

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1. Third Uttar Pradesh Lawyers' Conference, 1947, Kanpur. High Court Administrative Department File III, resolution 4. I am indebted to Miss Gillian Buckee for this reference (emphasis mine)

2. V.G.Ramachandran: The legal profession as a social unit (1953) II M.I.J. Jnl. 28

3. Law and Lawyers (1951) 53 Bom.L.R. Jnl. 17 at 19.

4. See footnote 1 and further Gillian Buckee: The Uttar Pradesh Bar before 1935 (to be submitted for a Ph.D. dissertation to London University in 1972).

so to the Madras lawyers.[5] On the latter occasion he had just returned from a Commonwealth lawyers' conference at Sydney, and hoped that Indian lawyers

> "speaking with a united voice (would) be a most powerful and influential body which would in the course of time play a respected and dominant role in the country and work for the good of the nation as a whole." 6

for to him

> "lawyers (were) by (the) very nature of their training and occupation in the forefront of activities which make for national (...) development ... It would ... be a serious impediment ... if (Indian) lawyers should not bear the stamp of integrity and if they fail to adhere to maintain the highest standards of conduct." 7

The lawyer was reduced to patting himself on the back, and put up the plea of discrimination. One judge seemed to think that all this was part of a universal prejudice against lawyers by collecting assorted quotations taken from history.[8]

There were three options open to the lawyer - politics, the teaching of law, and practising at the bar.

At first the lawyer wanted the option of politics left open, and the Uttar Pradesh Bar passed a resolution at Kanpur in 1947 asking the High Court not to change its rules to close this option.[9] But the lawyer politician is a thing of the past in India,

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5. Speech reported (1952) 54 Bom.L.R. Jnl. 1 at 5.

6. Ibid at 3.

7. Ibid at 5.

8. S.S.Dhavan: The role of the bar and the judiciary in the democratic state. Allahabad Centenary Volumes (1968) II, 303-4.

9. Third Uttar Pradesh Lawyers' Conference 1947, Kanpur. High Court Administrative Department File III, resolution 20. I am indebted to Miss Gillian Buckee for this reference.

even as a Q.C., M.P., and lawyer members of Parliament, like M. C. Setalvad and N. C. Chatterji, are better known for their legal views than their contribution to public life or politics, even though lawyers have often caught the public eye for political reasons.[10]

Some lawyers tried to tidy up the legal teaching profession and a lot of literature has grown around that subject.[11] The Law Institute has been set up, with western help,[12] and its journals along with the journals of the faculties of law of Banaras and Aligarh have increased the juristic output to a better quality than that provided by the somewhat unpredictable standards seen in the journals supplemented to the private law reports from Madras, Bombay, Allahabad and Calcutta. The basis was rather well put by an American critic:

> "Indian legal teaching inevitably tend(s) to evolve in patterns that emphasise rote memory. To impart information, not critical understanding, remain(s) the goal of Indian education." 13

No change of law courses will by itself supply the need for indigenous theoretical nourishment.[14] It is beyond the scope of this thesis to comment on problems of legal teaching.

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10. Note the manner in which the press followed N.A.Palkivalla during the Bank Nationalisation case (e.g.) Statesman Weekly Nov. 8, 1969.

11. A fairly representative list of the literature on the subject can be found cited by R.B.Sunshine and A.L.Berney: Basic legal education in India (1970) 12 J.I.L.I. 139 at f.n.2.

12. See Merrillat's account of this in (1959) Am.J.C.L.519

13. Von Mehren: Law and legal education in India (1963) 78 Har.L.Rev. 1180 at 1187.

14. See for example the suggestions made by G.S.Sharma for a longer three year course in Essays in Indian jurisprudence (Ed. G.S.Sharma 1965) Chapter VIII.

Most lawyers, however, chose to practise at the bar, which was and still is overcrowded, as the Law Commission Report indicates.[15] A lot of suggestions were made to deal with its organisation. Writers suggested the Russian system,[16] others hoped that seniors would evolve a superannuation scheme (aware that the State could not afford it) and gracefully retire.[17] Newcomers lampooned the system,[18] or objected publicly.[19] The problem was not like America's - an exodus to Wall Street[20] - but simply one of brieflessness. Corruption and "toutism" were rampant and one such case even reached the Supreme Court, where the lawyer argued that the Supreme Court did not have the power to frame rules preventing his activities in the area.[21]

But despite all this the lawyer has gradually acquired a status of his own. The Constitution, social reform (like the Hindu Code) and administrative needs led to a flood of statutes affecting the life, property and social ways of many people. Litigation,

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15. Law Commission XIV th Report, Chapter 26, pp 556 ff, particularly Annexture at 584-5 showing total number of lawyers in India.

16. V.G.Ramachandran: Socialisation of the legal profession in socialist India (1956) 58 Bom.L.R. Jnl. 70; S.S.Dhavan: The challenge of communism and the legal profession (1960) 58 All.L.J. Jnl.1. The latter delivered several lectures on this theme in August 1965, after his return from the tour of the U.S.S.R. in the summer of that year. I have a personal copy of these lectures.

17. V.P.Raman: Superannuation and the Bar (1954) II M.L.J. 23 esp. 25-6, 28-9

18. See the rather funny A Freshman's Lament (1957) 59 Bom.L.R. Jnl. 26.

19. Ravi S. Dhavan: The young lawyer, radio talk (1969), All India Radio Allahabad. I have a personal copy of the text of the talk.

20. On this see Ralph E. Engel: The young lawyer faces unemployment (1970) Am.B.A.J. 751

21. See the case In re Sant Ram A.I.R. 1960 SC 932

however, does not start on its own. Litigants, and this is more important in India's context, bring their complaints to a lawyer and ask him to perform his jugglery act to help them. It is here that the lawyer is most important. A well known authority on Hindu law has recently complained that irresponsible litigation has taken place under the divorce provisions of the Hindu Marriage Act 1955.[22] Who is to blame ? Indian society surely, but also the lawyer and his tout - touting being a calling, if not a profession. Litigation is initially made or broken in his office. Equally frivolous sometimes are the lawyers' arguments in Court, and recently the Supreme Court have chided counsel by saying that the case before them should never have been brought before them.[23] It is the lawyer who has in the past made strange appeals "to the spirit of the Constitution" while arguing impossible cases,[24] made an indiscriminate use of Article 14 of the Constitution as a platform for attacking almost any kind of governmental activity[25] and more recently used the Court to attack the government's political power to amend the Constitution in the famous case of Golak Nath v Punjab (1967)[26] while the government moved on the assumption that it has the power on the basis of decision made by the

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22. Section 13 of the Hindu Marriage Act 1955. See Derrett's exclamations in the Critique of Modern Hindu Law (1970) Appendix IV, 436 ff.

23. U.P. v Sushil Chandra AIR 1970 S.C. 2191 (per Shah J) at pr 4, p 2192.

24. B.R.Ambedkar's arguments in Kameshwar v Bihar A.I.R. 1952 S.C. 252 rightly rejected by the court.

25. See infra Chapter III.

26. A.I.R. 1967 S.C. 1643. These arguments were first made to the court in 1951 in Shankari Prashad v Union A.I.R. 1951 S.C. 458.

Supreme Court as early as 1951. Slowly the lawyer has involved himself in the lives of the people and arrogated to himself a status often unequal to the function that he performs. In 1950 the Chief Justice of the Bombay High Court thought that the lawyer's role was simply to help the judge to whom the Constitution had assigned a constructive role.[27] But the lawyer's role is more important than that for he is the one who first decides what interests are worthy of protection. Critics of the Supreme Court concentrating on the appellate tradition are apt, sometimes, to neglect this role of the lawyer. It is true that a lawyer must defend his client at all costs but is it not possible that the lawyer in his quest for work and prominence has forgotten some of the wider problems of the profession ? Latterly, one Chief Justice of India has accused lawyers of sometimes deliberately mis-stating the law.[28] Another judge sums this up very well:

> "Due to fierce competition caused by overcrowding some lawyers are compelled to encourage or even manufacture unnecessary litigation. If the administration of justice is thus perverted, the profession loses its very right to exist ... The legal profession in India cannot sit idle while democracy is struggling for survival." 29

Further the lawyer has distorted his own role. He has posed as the champion of liberty and used the Constitution as the justification of his own intrusion in Indian life, often merely paying lip-service to the western labels that he uses. There has therefore

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27. M.C.Chagla: speech reported in his collection of essays: Individual and the State (1961) 55.

28. M.Hidayatullah: speech at Bombay, referred to by Seervai: Position of the judiciary under the Constitution of India (1970) 74-75.

29. S.S.Dhavan: The challenge of communism and the legal profession (1960) 58 All.L.J. Jnl. 1 at 3, 7.

been a lot of doctrinnaire litigation, appeals being based on western ideas of law. The process of self-indoctrination is evident from the number of articles - appearing in Indial legal periodicals - which praise without discussion well known western liberal concepts. Some of these articles include :

"Our Constitution and our right to equality, liberty and property." 30.
"Liberty and social control." 31
"Fundamental rights." 32
"A pragmatic evaluation of fundamental rights." 33
"Law and liberty". 34
"Liberty and democracy." 35
"Law and lawyers." 36
"Freedom from law." 37
"Evolution of a just legal order." 38
"Liberty and personal liberty". 39
"The executive and democracy." 40
"Role of the lawyer in the Constitution of India." 41

It is almost as if the lawyer is convinced that he has something to say and is looking for a platform to speak from. Thus one lawyer talks of how :

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30. Gyan Prakash:(1954) 52 All.L. Jnl. 5.

31. K.Venkoba Rao (1953) S.C.J. Jnl. 203

32. H.S.Ursekar (1960) 62 Bom.L.R. Jnl. 129

33. B.K.Sharma (1960) S.C.J. Jnl. 18, 35 at 35 talks of fundamental rights as the aspirations of the people.

34. M.C.Chagla (1950) 52 Bom.L.R. Jnl. 49

35. R.K.Ranade A.I.R. 1950 Jnl. 75, 83.

36. M.C.Setalvad (1951) 53 Bom.L.R. Jnl. 117

37. T.Ramalingam (1956) S.C.J. Jnl. 83.

38. V.G.Ramachandram (1956) S.C.J. Jnl. 89

39. Ibid (1956) M.L.J. Jnl. 40

40. Surya Kumar (1968) Lawyer 158-60

41. Ibid (1967) Lawyer 41

> "the salvation of the individual lies in the fundamental rights part of the Constitution." 42

These are emotive ideas, such as made one judge actually talk of the Supreme Court "as a Constituent Assembly in continuous session".[43] This betrays an attitude which has a disastrous effect on litigation. Lawyers tend to regard themselves as John Hampdens fighting for a cause which is already won. Their duty now is to use their discretion to evaluate what needs and interests they want to protect instead of posing as champions of and for everything. It is in this spirit, partly as champions of the litigant (whether litigious or vexatious or neither) and partly as a profession manufacturing its own employment that lawyers patronise, as well as write, an extraordinarily voluminous literature, which draws its inspiration perforce not from India's real needs and conditions, but from a cosmopolitan legal scholarship, whose relevance to India is assumed not proven. Too much emphasis has been laid on other Constitutions. Thus a famous five volume commentary on the Constitution compares each article of the Constitution with the corresponding provisions in the Constitutions of the rest of the world.[44] Several articles were written in the same spirit,[45] differences were sometimes accepted, but the western

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42 M. Arunachalam: The individual and the Constitution (1959) S.C.J. Jnl. 68 at 78.

43. K.Bhimasankaran: The judiciary under the Constitution (1957) 59 Bom.L.R. Jnl. 129-32 at 131.

44. D.D.Basu: Commentary on the Constitution of India (1950 in 2 but later in 5 volumes).

45. See C.H.Alexandrowicz: American influence on constitutional interpretation in India (1956) Am.Jnl.Comp.L. 98; V.G.Ramachandram: Guarantees of fundamental rights in other constitutions (1956) S.C.J. Jnl. 184; M.K.Nambiyar: American borrowings in the Indian Constitutions (1954) S.C.J. Jnl. 151.

model was inevitably accepted and the need for comparison reiterated.[46] All this has made the lawyer think in far more revolutionary terms about law and his role as its champion, than was intended. The effect of this uncontrolled "championship" has been felt in the Courts, which apart from accumulating arrears, have had to adjudicate on western concepts not always suited to India. With that we are not concerned at present. What concerns us here is the aura of emotion that the lawyer has tried to raise about himself, rather than the simple fact that he expressed an affection for outmoded or inappropriate western concepts. The lawyer often examined these concepts and often wrote general articles (which asked somewhat uncritically that the role of the State be re-examined) and lawyers discuss the advent of "Democratic Socialism and its impact on the Indian Constitution".[47] The then Chief Justice of Patna wrote an article on "Parliamentary government and a planned economy" [48] where he emphasised the supremacy of Parliament and retained this position as a Supreme Court judge in the famous case of Golak Nath v Punjab (1967).[49] Others talked of :

> Liberty and social legislation in the welfare State. [50]

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46. See L.R.Sivasubramaniyam's review of W.Douglas, Tagore law lectures published in America as We the Judges (1956), Univ.of Chicago L.Rev. 563 at 570

47. V.G.Ramachandram: Democractic socialism and its impact on the Indian Constitution (1953) M.L.F. Jnl. 1

48. V.Ramaswami: (1953) II M.L.J. Jnl. 1

49. A.I.R. 1967 S.C. 1643

50. V.N.Shrinivas Rao: (1968) Lawyer 74-78, 147-52

"Nationalisation in the welfare state"[51]

or asked

"Can socialism be introduced in the Indian Constitution ?" [52]

But the answer in all cases seemed only to say what Holmes was trying to say in Lochner v New York (1902) when he remarked that "the Constitution did not enact Spencer's Social Statics"[53] and in no case dealt with Indian conditions.

The lawyers' awareness of interests other than the individual's is not disputed at this stage. What is being emphasised is that arrears of cases are increasing and lawyers must not think, as one lawyer obviously does, that the more people resort to the courts the more does it indicate that the rule of law is gaining hold.[54] Litigation is becoming the favourite pastime of the Indian people. The lawyer is an important part of the litigation process. He has the capacity to restrict the number of cases that reach the court. But it appears that for reasons of his own he has not chosen to do so.

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51. Paras Diwan: (1953) S.C.J. 21

52. C.S.Subramaniyam Aiyar: (1953) I M.L.J. Jnl. 31

53. Lochner v N.Y. (1902) 198 U.S.205

54. V.G.Ramachandran: Social structure in a welfare state, with particular reference to India (1956) S.C.J. Jnl. 37

3. The Judge

The Constitution has altered very fundamentally the importance of judges in India. Prior to 1935, the judges of the several High Courts were prominent and respected members of the community and decided on important social issues, but were not a part of the power structure. In 1930, in an exhaustive survey, the Indian Statutory Commission did not mention the judiciary at all, apart from suggesting the odd minor reform.[1] The Indian lawyer wanted a Federal Court which would take the place of the Privy Council in appellate matters and be part of the power structure in Constitutional matters. Sir Hari Singh Gour presented the first Bill outlining the need for such a Court to the legislative Council on March 26, 1921.[2] Five attempts later, the Nehru Report agreed that such a Court was desirable,[3] - a view endorsed by the Government in a White Paper,[4] provision being made for the establishment of the Federal Court of India in the Government of India Act, 1935.[5] The history of this development and its political implications have been traced elsewhere and need not be outlined here.[6] Under the 1935 Act the Federal Court was the first Court

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1. See Volume I and II of the Report Cmd 3568 and 3569 respectively. The administrative reform is suggested in Volume II, Part X, prs 341-349.

2. Legislative Assembly Debates I, 1606.

3. Report of the All-India Congress Committee, Allahabad, 1928.

4. White Paper Cmd 3451.

5. Government of India Act 1935 sections 200 ff.

6. See George H.Gadbois Jr.: Evolution of the Federal Court of India (1963) 5 J.I.L.I. 19 and M.Y.Pylee Ph.D. Thesis : The Federal Court of India (1966) Chapter III 64.

in India which represented not just an independent judiciary, but a separate power in the apparatus of government.

This was something new to the Indian system, for independence of the judiciary is one thing and separation of powers quote another. In ancient India the supremacy of dharma was recognised but Manu emphasised the doctrine that subjects had an overriding duty to obey their king.[7] While it can be argued that a limited right to disobey existed,[8] it was nowhere suggested that it should be articulated through the judiciary.[9] The king's discretion in judicial matters was sought to be controlled by the inclusion of Brahmins (as a text of Katyayana[10] suggests) and others to assist him in the discharge of his judicial duties. Later, when a separate judiciary was established, they were not made part of the policy-making structure (not even in jurisdictional matters) and what was emphasised was the virtue of non-interference by the king (i.e. independence) not a constitutional check by the judiciary.[11] Again, it has emphasised that

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7. Manu VII 3-13.

8. See John Spellman: Political Theory in Ancient India (1964) Chapter IX Revolution pp 225-243. On the judiciary see A.S.Altekar: State and Government in Ancient India (1958) pp 203-204, 327-328, 244 and an interesting section on popular courts at 250-261.

9. See for example John Spellman (supra f.n.8) on methods of revolution pp 238-243.

10. Katyayana (Kane's Collection) 58

11. For two brief accounts emphasising this independence aspect see B.N.Chobe: Judiciary in Ancient India (1954) S.C.J. Jnl. 85; The art of governance in Ancient India (1956) S.C.J. Jnl. 19; see also Dhavan (supra section b f.n.6). For an account of procedure and jurisdiction see Sir S.Varadachariar: The Hindu Judicial System (Lucknow 1946). But one has to be careful for one cannot be sure whether word was followed by action.

in Mughal days, judges often stood up against the executive (i.e. the king). Thus in State v Qazi Mir[12] the Court refused to pass a sentence of death which the king had asked it to; in State v Shiqdar[13] a police officer had to pay damages for wrongful arrest. In several cases, including one which involved the East India Company,[14] damages were awarded against the State. There were several other cases, where the independence of the judiciary was emphasised,[15] but there are no cases where the judges thought in terms of judicial review, whether substantive or jurisdictional.

The 1935 Act ushered in a new kind of judicial power.[16] The use of this power by the Federal Court was, however, much more limited than certain exaggerated accounts of the Court suggest.[17] For a variety of reasons - the fact that its jurisdiction was limited to the interpretation of the 1935 Act being the most important factor - it did not set itself up as a "third power" in the constitutional set-up. It could not - nor had it the power to - pose as the champion of fundamental rights, although its power to protect a citizen's right to

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12. M.B.Ahmad: The administration of justice in medieval India (1941) 68-9.

13. Ibid 88-9.

14. Referred to in Captain Hamilton's Diary I, 227-32, quoted in M.B.Ahmad (supra) 193 along with Haji Zahid and Pirji v State, Sher Mohammed v State, Khan-e-Jahan's case.

15. See the description of 10 cases by M.B.Ahmad 254-6 and on the relationship between the Qazi (the judge and the ruler) 68-70, 88-90, 193 and esp. 277-279.

16. High Courts did of course control delegated legislation on which see S.Das: The doctrine of ultra vires in India (1902) by the usual Common Law rules. See R.V.Burah (1878) 3 A.C. 889 = 5 I.A. 178

17. For a somewhat exaggerated picture see M.V.Pylee (supra F.n.6).

property was by no means non-existent.[18] It did in certain cases, like Niharendu Dutt Maujumdar v K.E.[19] K.E. v Shibnath[20] and K.E. v Beonarilal Sharma[21] (the latter judgement, according to one commentator, cost Sir S. Varadachariar his appointment as Permanent Chief Justice of the Court[22]), but these were largely in the sensitive area of preventive detention. The Court's achievement was that it tidied up the federal structure and absorbed foreign federal doctrine, thus avoiding many of the problems that could otherwise have arisen after 1950. The Constitution is by and large based on the Act of 1935[23] and it is to the Court's credit that the Constituent Assembly did not alter the blue print in the 1935 Constitution.[24] A detailed survey of the Court's performance can be traced elsewhere.[25] Since the Court did not deal with Fundamental Rights it could not pose as the Champion of the People. In its history the Court decided 165 cases (not including four advisory references) and sat for an average of 28 days a year over the 11 years of its existence. This may be contrasted with a very conservative estimate by one Chief Justice of 600 per year for the present Supreme

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18. See S.299 of the Act and subsequent Supreme Court case law on that esp. Jee Jee Bhoy v Asst. Collector A/R1965 S.C. 1096. It was never interpreted by the Federal Court.

19. A.I.R. 1942 F.C. 22.

20. IV F.L.J. 151.

21. IV F.L.J. 79.

22. Pylee (supra f.n.6) 252.

23. For a closer look at this see Seervai: Constitutional Law of India (1962) 78 L.Q.R. 388.

24. On the legislative lists see the following cases on "pith and substance". U.P. v Atiqa Begum (1940) F.C.R. 110; Chettiar v Advocate General of Madras (1940) F.C.R. 188; Bank of Commerce Ltd. v Amylya Krishna Basu Roy Chourdhry (1944) F.C.R. 126; Bank of Commerce Ltd. v K.B.Kar (1944) F.C.R. 370; Lakhi Narayan Das v Bihar (1949) F.C.R. 693 esp. at 707.

25. For a survey of the Court's contribution see Pylee (supra f.n.6) Chapters VIII-IX, p. 156 ff; George H.Gadbois Jnr.: The Federal Court of India 1937-1950 (1964) 6 J.I.L.I. 253.

Court. In actual fact the disposal is somewhere in the region of 3,000.[26] The Federal Court was in this sense in no way a "dress rehearsal" for the Supreme Court's later exercise of power, but its existence might help to explain why the early Supreme Court judges were so reticent about freely exercising judicial power.

The Constitution assigned to the Supreme Court a constructive role. A leading commentator on the Constituent Assembly has remarked :

> "The judiciary was to be the arm of the social revolution, upholding the quality that Indians had longed for in colonial days ... (T)he courts were also idealised because, as guardians of the Constitution, they would be the expression of a new law created by Indians for Indians." 27

But one must not be misled by these accounts,[28] for the Constituent Assembly distrusted the judiciary whenever faced with the problem of granting them power to have the decisive decision in matters of social and economic policy. Perhaps Mr. Nehru hinted at this when in another context he made the oblique remark :

> "Whatever the legal aspect of a thing there are moments when it is a feeble reed to rely on," 29 –

suggesting that the path of change lay elsewhere. The Assembly respected the Courts. One member hoped that the Court would take on additional

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26. Estimate of Federal Court from Gadbois (supra f.n.25) 255; of the Supreme Court B.P.Sinha Chief Justice of India; Foreword to M.V.Pylee (supra f.n.6) pp viii-ix. Sinha's estimate is unfair for in 1962 (when he wrote) the Supreme Court disposed of 1243 civil cases (for full details see infra) and 1048 criminal cases by special leave, 889 civil appeals, 309 criminal appeals and 344 writ petitions. A total of 3833.

27. Granville Austin: The Indian Constitution (1966 O.U.P.) 167. But this is not a lawyer's account. His sympathy for India and for social revolution make his thesis somewhat suspect.

28. See generally ibid Chapter VII.

29. I Constituent Assemby Debates (C.A.D.) 61.

responsibilities[30] (though to her this meant acting like the King's Bench in England[31]) and another thought that its independence ought to be respected and remain unimpaired.[32] But the fact remains that when it came to giving them power in matters of judicial review, property[33], preventive detention and due process,[34] the Constituent Assembly held back. One prominent member, not forgetting the American experience, put the general mood rather well :

> "It might ... be that to give the judiciary an enormous amount of power - a judiciary which may not be controlled by any legislature in any matter except by the means of ultimate removal - we may perhaps be creating a Frankenstein monster, which could nullify the intention of the framers of the Constitution. I have in mind the difference that was experienced in another country." 35

The logic of the Constitution in the words of another prominent member was that :

> "instead of leaving it to the courts to read the necessary limitations and exceptions recognised in any well ordered state ... (they are) ... in the Constitution itself." 36

The Constitution was however imprecise, and the concept of "reasonableness" (on the due process model) left plenty of room for introducing judicial policy.[37]

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30. Smt. Durgabai IV C.A.D. 712-13.

31. Ibid at 712-18.

32. Per Mr. B.M.Gupta IV C.A.D. 796.

33. On property see IX C.A.D. 1191-1311 and Chapter III infra.

34. G. Austin (supra f.n. 27) 101-112 and Chapter IV infra.

35. VII C.A.D. 583 (per Mr. T.T.Krishnamachari).

36. VII C.A.D. 336 (per A.Krishnaswami Ayyar).

37. This is at present being examined by Mr. T.K.K.Iyer in a dissertation (to be submitted to the London University) entitled "The Concept of Reasonableness in the Indian Constitution".

How did the judges react to these limitations ? The earlier Court accepted them sometimes - even apologising for giving the impression that they were stepping out of line and claiming that they were misunderstood.[38] Others emphasised the rule of law,[39] and some the supremacy of Parliament.[40] Judges were, however, prepared to think of themselves as a third and inferior chamber, though one judge did describe the Supreme Court as a Constituent Assembly in continuous session.[41] The attitude of the early Court leaned on reticence, but later the Court became a little undecided. This may be illustrated by the equivocal position taken by Justice Hidayatullah in his Lala Lajpat Rai Lectures. At one stage he insisted that the Constitution was a "complete document ... containing all the answers to the problems of State"[42] but later said "its extreme brevity of expression requires constant exposition in interpretation and construction"[43] hastily adding however that what "the judiciary does ... is from within the Constitution. It has no will of its own."[44] In his introduction he actually apologises if "in describing the role of the judiciary, he has strayed into hyperbole."[45] The learned judge's dilemma displays

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38. Chief Justice Patanjali Shastri's speech at Madras Lawyer's Conference A.I.R. 1955 Jnl. 25

39. Chagla: (1950) 52 Bom.L.R. Jnl. 49; Individual and the State (1961)35

40. V.Ramaswami: Parliamentary government in a planned economy (1953) II M.L.J. Jnl. 1. Gajendragadkar: Indian Parliament and Fundamental Rights (1972) reported Feb.26, 1972, National Herald.

41. K.Bhimasankaran (1957) 59 BomL.R. Jnl. 129-132.

42. M.Hidayatullah: Democracy and the judicial process in India(1966) 52

43. Ibid at 68.

44. Ibid at 69.

45. Ibid Preface.

the difficulty in making the choice between judicial restraint and the possibilities of power.

It appears that the judges are now more prepared to make the latter choice, suggesting that they are being driven to that position by the legislature, and, as one ex-Chief Justice of India suggested, by Constitutional Amendment.[46] More recently, judges have become a little bolder and are talking of "the judicial salvage of freedom"[47] and at least three Chief Justices of India have talked of their duty to protect the Constitution taking a very wide view of their jurisdiction and their role.[48] They have punished for contempt the suggestion that they suffer from "class bias"[49] and publicly denounced the charge that they are "committed".[50]

This new development poses problems. Firstly, can the judges tackle creatively as well as responsibly the various socio-economic problems that the Court is faced with ? Secondly, would they be able to do this on the basis of "neutral principles" ?[51] Lastly, do they have the staff and the equipment to deal with all the problems involved or do they require a Ministry of Justice in the sense in which Cordozo meant it[52] to help them ? The latter idea was

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46. See Chief Justice K.Subha Roa: Some Constitutional Problems (1970) 170 ff.

47. See ibid Chapter II, 56-170.

48. K.Subha Rao (supra f.n.46); Sikri (present Chief Justice) at Chandigarh reported (1971) I S.C.J. Jnl. 72; Ex-Chief Justice Shah Tata Memorial Lectures, Bombay, summarised India Weekly, London, Apr.15, 1971.

49. E.M.S.Namboodripad v T. N. Nambiar A.I.R. 1970 S.C. 2015.

50. K.S.Hegde: speech in Delhi reported Statesman Weekly Jan. 27, 1971.

51. Discussed and explained infra. Chapter III Section 3 p.114 ff

52. B. Cardozo: A Ministry of Justice (1921) 35 Har.L.Rev.113

put forward in India and is being considered by the Government.[53] Perhaps it would be wiser to stick to the time-honoured formula of judicial restraint and confine itself as closely as possible to problems of jurisdiction and the power of review in the English rather than the American sense of the word. This is what the politician is complaining about. There is no lack of respect for the judiciary, for Parliament has recently expressed sympathy with the idea of an independent judiciary and suggested that their standards of living and salaries must be raised.[54] Further, it has passed the Contempt of Courts Act, 1971, which protects the judiciary from criticism.[55] The controversy centres around the right, power, and ability of the men who man the Court, and it is the adequacy of their judicial techniques to take on the responsibility of discussing involved questions of policy, that is being questioned.

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53. Put forward by Governor (of W.Bengal) S.S.Dhavan and endorsed by an M.P. in Parliament (1970) L.S.D. (IVth Series) Vol.43 No.8 col.83-84. A plea for a somewhat different kind of Ministry of Justice is made by the Law Commission (XIVth Report) Vol.II 1224-1225.

54. See for example the discussion in Parliament (1970) at L.S.D. (IVth series) Vol.39 No.39 col.51-53; (1970) Vol.40 No.48 col.1-8.

55. See a newspaper account of the Parliamentary discussion of the Debate in Statesman Weekly Dec.25, 1971, p.4. Note however Mr. V.K. Krishna Menon M.P. (who argued the Namboodripad case (supra f.n.49)) and K.C.Haldar, M.P. (C.P.I.M.) criticisms of judicial attitudes. Only newspaper Report seen.

4. The Supreme Court Judges - a Portrait.

Although a great deal has been written on the Supreme Court[1]

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1. See T.S.Rajagopala Iyengar: The creative role of the Supreme Court of India (1970). Despite the flattering review at (1971) 1 M.L.J. Jnl. 10-11 it is really an analysis of the Supreme Court on Constitutional law on which the more scholarly account of M.Imam: The Supreme Court and the Constitution (1968) is to be preferred; Seervai: The position of the judiciary in India (1970) and an excellent review of it by S.Sahay: Statesman (Overseas) Weekly Sept. 19, 1970 p.9; G.H.Gadbois: The Supreme Court of India - Preliminary report of an empirical study (1970) IV J.C.P.S. 33; S.V.Raman: Judicial review and the Supreme Court A.I.R. 1969 Jnl. 122, 130; T.K.Tope: The Supreme Court and the felt necessities of the time (1964-5) 33 Govt. Law College (Jnl.) 1; P.Trikamdas: The Supreme Court of India (1967) J.I.C.S. 81; T.P.Dubey: Supreme Court and High Court Judges under the Indian Constitution A.I.R. 1953 Jnl. 16-18; Ed. Note: The Supreme Court and social justice (1965) 70 C.W.N. Jnl. 11. The only extended account of the Supreme Court is S.R.Sharma: The Supreme Court in the Indian Constitution (1959, Delhi) but despite the praise accorded to it (A.I.R. 1960 Jnl. 72 col. 1) it is neither a lawyer's account nor does it deal with the techniques used by the Court. Special accounts of the Supreme Courts on certain aspects of the law also exist, e.g. Soonavala: The Supreme Court and Industrial Law (1968); Soonavala: The Supreme Court and Criminal Law (1968, Bombay Vol. I and II). But these are written from the point of view of the practitioner and contain merely a digest of the cases decided by the Court. Articles on the Supreme Court's performance in various cases can be found in several journals and will be referred to later.

the judiciary and the judicial process in india,[2] very little is

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2. R.K.Sircar: The position of the judiciary under the Constitution of India A.I.R. 1951 Jnl. 27-32; V.G.Ramachandram: The role of the judiciary in India A.I.R. 1954 Jnl. 95-6; L.R.Ganu: Administration of law and Justice in India of tomorrow A.I.R. 1955 Jnl. 110; B.R. Mandlekar: Aministration of law under changed social conditions A.I.R. 1957 Jnl. 116-7; R.K.Ranade: Justice in democratic India A.I.R. 1958 Jnl. 41-2; L.S.Mehta: Delays in Courts A.I.R. 1959 Jnl. 36-7; Y.V.Dixit: The judiciary and political appointments A.I.R. 1959 Jnl. 2; K.K.Banerji: The life of a judge A.I.R. 1960 Jnl. 51-3; K.Umamaheshwaram: Role of the judiciary under the Constitution A.I.R. 1960 Jnl. 15; N.V.Gadgil: Appointment of judges A.I.R. 1960 Jnl. 106-110; J.N.Malik: Removal of judges A.I.R. 1964 Jnl. 42; G.C.Das: Role of the judiciary in the maintainence of law and order A.I.R. 1964 Jnl. 43-7; Ed. note: (1965) 70 C.W.N. Jnl. 19; see also (1965) II S.C.A. Jnl 43; A.S.Kuppuswamy: Appointment to the judiciary (1967) I M.L.J. Jnl. 77; T.Von Mehren: The judicial process with particular reference to the United States and India (1963) V J.I.L.I. 271; P.G.Rajagopalan: Dissatisfaction with the Courts (1967) I S.C.A. Jnl. 11; Ed.note: Judicial Independence (1966) 71 C.W.N. 57; T.Viswanath Aiyar: The law, the judiciary (and) the rule of law (1967) I M.L.J. Jnl. 7; R.M.Sahai: Law, lawyers and judges (1967) 65 All.L.J. Jnl. 1; V.M.Bhojraj: A new approach to judicial decision making A.I.R. 1968 Jnl. 110; G.S.Ullal: Do judges live in an ivory tower ? A.I.R. 1968 Jnl. 37 (on certain aspects of delegated legislation); D.D.Sharma: Judicial independence and impartiality (1968) II S.C.J. Jnl. 24; Ed note: Parliament and the Courts (1969) 73 C.W.N. Jnl. 169; B.K.Pal: Judicial behavior and the rule of law (1969) S.C.D. Jnl. 49; V.K.Thiruvenkatachalam: Judicial review and the Supreme Court A.I.R. 1969 Jnl. 122, 130; G.C.Singhvi: Separation of the Judiciary from the executive ... (1970) IV J.C.P.S. 288; R.N.Sarkar: Role of a judge in a democratic society (1970) 74 C.W.N. 118; B.Madhusadan: Delay in Courts and justice A.I.R. 1970 Jnl. 69; S.S.Dhavan: on judges generally National Herald Dec.11, 1970; M.Hidayatullah: Judicial methods (B.N.Rau Lectures reprinted (1970) III J.C.P.S. 1. The best review of the judicial system remains the XIVth Report of the Law Commission (1958, Delhi Volumes I and II)

by way of material on[3]

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3. The best accounts to date are those of George H.Gadbois Jnr: Selection, background, characteristics and voting behavior of Indian Supreme Court Judges in Schubert and Danelski (ed) Comparative judicial behaviour (1969 O.U.P.) Chapter 9, pp 221-56; ibid: Indian Supreme Court Judges - a portrait (1968) III Law and Society Review 317-336; Autobiographies have been written by Mahajan: Looking back (1963); Hidayatullah: A judge's miscellany (1972 - forthcoming). The following biographical material is available - V.D.Mahajan: Chief Justice Gajendragadkar (1967) containing a valuable anthology of his addresses pp 66-347; V.D.Mahajan: Chief Justice Subba Rao - Defender of Civil Liberties (1968). See also on Subba Rao - V.G.Ramachandran: The ninth Chief Justice of India A.I.R. 1966 Jnl. 58-60; K.M.Sharma: A.I.R. 1967 Jnl. 18-9. On Hidayatullah see ed. notes: (1971) M.L.J. Jnl. 1-2; A.I.R. 1971 Jnl. 21. Similar notes may be found on other judges e.g. K.B.Mehta on B.K.Mukerjea A.I.R. 1955 Jnl. 57. Again information is also available in court references following the death of a judge - whether sitting or retired, e.g. on Mahajan at (1967) III S.C.R. (i)-(ii). A great deal of information is available in the autbbiography of the first Attorney General of India, M.C.Setalvad: My life ... (1970) notably in a speech of S.R.Das C.J. at a dinner on his retirement quoted in extenso at pp 366-8. There is a well prepared index which gives Setalvad's views on various judges, e.g. on Sinha J. at 428-9, 500-1; on Kapur J. at 509; on Sarkar J. - his first impressions at 162. Various accounts have been written on the contributions of particular judges to various branches of law. These include: P.Trikamdas: Justice Bhagwati as a lawyer (1960) II J.I.L.I. 5; M.P.Jain: Justice Bhagwati and administrative law (1960) II J.I.L.I. 7; H.C.L.Merrillat: Chief Justice S.R.Das - a decade of decisions on rights of property (1960) II J.I.L.I. 183; P.B.Mukharji: Chief Justice S.R.Das and Equality before law (1960) II J.I.L.I. 161; B.Sen: Chief Justice Sinha (1964) VI J.I.L.I. 133; R.L.Narasimhan: Chief Justice Sinha - A review of some of his decisions (1964) VI J.I.L.I. 145; T.S.Rama Rao: Chief Justice Sinha and property rights (1964) VI J.I.L.I. 153; S.N.Dhyani: Justice Gajendragadkar and labour law (1967) VII Jaipur L.J. 69; P.K.Tripathi: Mr. Justice Gajendragadkar and Constitutional interpretation (1966) VIII J.I.L.I. 479; P.W.Rege: Contributions of Mr. Justice Gajendragadkar to Hindu law (1966) VIII J.I.L.I. 606; G.Chandra: Mr. Justice Gajendragadkar and Criminal law (1966) VIII J.I.L.I. 588; J. Duncan M. Derrett: The contribution of Mr. Justice Subba Rao to Hindu law (1967) IX J.I.L.I. 547; T.S.Rama Rao: Chief Justice Subha Rao and property rights (1967) IX J.I.L.I. 568; S.N.Prashad: Mr. Justice Subba Rao and fundamental rights A.I.R. 1967 Jnl. 19.

For background material I am very grateful to S.S.Dhavan (then Governor of W. Bengal) and the Hon'ble Mr. Justice P.B.Mukharji (then Chief Justice of the Calcutta High Court) who sent me short biographical notes on all the judges.

and by[4] judges of the Supreme Court of India.

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4. For autobiographical accounts see M.C.Mahajan (cited f.n.3 supra); Hidayatullah (cited f.n.3 supra). Other major works by judges include: B.K.Mukerjea: Hindu law of religious and charitable trusts (now see 3rd edn. 1970); Ibid: Problems of aerial law (1950); S.R.Das (ed): Mulla's Transfer of Property Act; N.C.Aiyar: Mayne's Hindu law and usage (11th edn. 1950); V.Bose: Preventive detention in India (1961) 3 Jnl. of Int.Comm.of Jurists 87; N.H.Bhagwati: (ed) Mulla's Law of Insolvency in India ( ); Translated V.L.Mehta: Cooperative movement into Gujrati; For an address of B.Jaganadhdas: see A.I.R. 1955 Jnl. 42; T.L.V.Ayyar: Evolution of the Indian Constitution (1970); Ibid: (ed) Mukerjea's Hindu law on religious and charitable trusts (1960 2d); J.L.Kapur: Law of adoption in India and Burma (1933); P.B.Gajendragadkar: Law, liberty and social justice (1965); The Constitution of India (1969); Kashmir - prospect and retrospect (1965); Secularism (1971); Indian Parliament and fundamental rights (1972 Tagore Law Lectures) see newspaper reports National Herald Feb. 23, 1972, Patriot Feb. 26, 1972, National Herald Feb. 26, 1972. K.Subba Rao: Our Constitutional problems (1970) see review A.I.R. 1971 Jnl. 44-5; Property rights under the Constitution (Shroff Memorial Lecture reprinted)(1969) I S.C.W.R. Jnl. 1-24; The philosophy of the Indian Constitution (1969) rev. A.I.R. 1970 Jnl. 179; Frequent tampering with the Constitution undermines freedom (1968) K.L.R. Jnl. 45; Freedoms in free India A.I.R. 1968 Jnl. 21. The jacket of the first work cited supra credits him with having delivered the following lectures: Rt.Hon. V.S.Srinivasa Sastri Lectures; Lal Bahadur Shastri Lectures; Lala Lajpat Rai Memorial Lectures: Dr. Rajendra Prashad Memorial Lectures. K. Wanchoo: The role of the judiciary(1968) III Civil and Military Law Jnl. 11-24; M. Hidayatullah: A Judge's miscellany (1972); Democracy and the judicial process in India (1968); Judicial methods (1970); B.N.Rau Memorial Lectures reprinted (1969) II J.C.P.S. 1; Humanism of Mahatma Gandhi (1970); Ed. Mulla's Principles of Mohommedan Law (1968 16th edn); The Constitution, Parliament and the Court (Sri Ram Memorial Lecture 1972) see Patriot Feb. 19, 1972; J.C.Shah: Tata Memorial Lectures (1970); V.Ramaswami: Hindu law and English judges A.I.R. 1960 Jnl. 89; J.M.Shelat: Akbar (in 2 volumes 1959 Bombay); Contributor to Munshi: His life and work; The tragedy of Shah Jehan (Bombay 1960); The spirit of the Constitution (1967 Delhi). Hegde: The directive principles of the Indian Constitution, B.N.Rau Lectures (1971) reprinted (1971) I S.C.J. Jnl. 50. P.J.Reddy: In quest of justice (1970) an anthology of his lectures and papers, see review A.I.R. 1970 Jnl. 150-1. M.H.Beg: Amendment to the Constitution (a cyclostyled essay written in 1968 of which I have a personal copy); contrib. G.S.Sharma (ed) Secularism, its implications for life and law in India (1966) and see comment of J.D.M.Derrett: Religious law and the state in India (1968) p. 535 f.n. A.N.Grover: Law of obscenity and freedom of expression (1968) III J.C.P.S. 6.

Judges to the Supreme Court are appointed under Article 124 of the Constitution, subsection (3) of which lays down :

> "A person shall not be qualified for appointment as a judge of the Supreme Court unless he is a citizen of India and :-
>
> (a) has been for at least five years a judge of a High Court or of two or more such Courts in succession ; or
>
> (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
>
> (c) is in the opinion of the President a distinguished jurist."

A recent judgement of the Supreme Court suggests that "an advocate of a High Court" does not mean that he must actually have practised in that Court or indeed anywhere at all.[5] No one has yet been appointed under Article 124 (3)(c). The Chief Justice of India has recently observed that in all cases the opinion of the Chief Justice has been decisive.[6]

To date forty-five judges (excluding R. S. Naik and Khaliluzzman JJ who formed part of a Bench to hear appeals from Hyderabad[7]) have been appointed to the Supreme Court of India. Two were directly recruited to the Supreme Court from the Bar,[8] six were judges belonging to the I.C.S. and therefore never practised at the Bar;[9] five other judges had judicial training in courts lower in the hierarchy than High Court.[10] Amongst the lawyer-judges recruited from the various High

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5, C.P.Agarwal v C.D.Parekh (1970) 3 S.C.R. 354 at 356-7.

6. S.M.Sikri: talk at the Institute of Advanced Legal Studies, June 21, 1971.

7. For their contribution see cases reported (1950) S.C.R. 741, 747, 753.

8. S.M.Sikri, S.C.Roy.

9. S.K.Das, K.N.Wanchoo, K.C.Das Gupta, R.Dayal, V.Ramaswami, V.Bhargava.

10. N.C.Aiyar, J.R.Mudholkar, J.M.Shelat, P.J.Reddy (he joined the State Judicial Service and was between April-June 1947 Secretary to the Law Department of his State), D.G.Parulekar.

Courts four had at some stage been Advocate Generals of their respective State[11] and eight others worked as lawyers for their respective State governments as counsel in lesser capacities.[12] The remaining judges had reasonably long careers as lawyers with private practice.[13]

As regards judicial experience, six had been judges of the Federal Court of India,[14] twenty-two Chief Justices of various High Courts,[15] and twenty-three senior puisne judges of the High Court they were recruited from.[16] At the time of recruitment three judges were from the Allahabad High Court,[17] although two others had at some stage in their judicial career belonged to that Court;[18] seven were appointed from the Bombay High Court;[19] J. M. Shelat had been a judge of the Bombay High Court but was later transferred to the newly created Gujerat High Court in 1960; eight came from the Calcutta High Court (including one judge who was later transferred to the East Punjab High

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11. S.J.Imam (Bihar - 1942-3), M.Hidayatullah (Central Provinces and Berar 1943-6), S.M.Sikri (Punjab 1951-64), K.Mathew (1960-2).

12. B.K.Mukerjea, V.Bose, B.P.Sinha, P.G.Menon, P.S.Raju, C.Vaidialingam, K.S.Hegde, M.H.Beg.

13. All the judges except those mentioned in f.n. 9, 11, 12.

14. H.Kania, S.Fazl Ali, P.Shastri, M.C.Mahajan, B.K.Mukerjea, S.R.Das.

15. H.Kania (Acting Chief Justice), S.Fazl Ali, S.R.Das, V.Bose, G.Hasan (Chief Judge, Oudh Court), B.Jaganadhdas, B.P.Sinha, S.J.Imam, S.K.Das, K.S.Rao, K.N.Wanchoo, M.Hidayatullah, K.C.Das Gupta, V.Ramaswami, P.S.Raju, J.M.Shelat, V.Bhargava, K.S.Hegde, P.J.Reddy, I.D.Dua, H.J.Khanna, M.H.Beg.

16. P.Shastri, M.C.Mahajan, B.K.Mukerjea, N.C.Aiyar, N.H.Bhagwati, T.L.V.Aiyar, P.G.Menon, J.L.Kapur, P.B.Gajendragadkar, A.K.Sarkar, J.C.Shah, R.Dayal, N.Ayyangar, J.R.Mudholkar, R.S.Bachawat, G.K.Mitter, C.A.Vaidialingam, A.N.Grover, A.N.Ray, K.Mathew, D.G.Parulekar.

17. G.Hasan, R.Dayal, B.Bhargava.

18. K.N.Wanchoo, M.H.Beg.

19. H.J.Kania (but note that he was appointed to the Federal Court), N.H.Bhagwati, P.B.Gajendragadkar, J.C.Shah, J.R.Mudholkar, D.G.Parulekar.

Court)[20]; eight came from the Punjab and Delhi High Courts,[21] one from the Himachal Pradesh High Court;[22] four from the Nagpur and Madhya Pradesh High Courts (including one later transferred to the Bombay High Court)[23]; four from the Patna High Court (including one judge later to the Nagpur High Court).[24] K. S. Hegde at some stage of his judicial career belonged to the Mysore High Court, G. Hasan had served on the Oudh Bench Court and B. Jaganadhdas came from the High Court of Orissa. K. N. Wanchoo originally from Allahabad was later transferred to the Rajasthan High Court. Six judges had at some stage belonged to the Madras High Court;[25] two to the Kerala[26] and three to the Andhra Pradesh High Courts[27] respectively.

Thus a total of ten judges came from Andhra, Kerala and Madras, eight from Calcutta, five from Bombay and Gujerat, ten from Punjab, Rajasthan, Delhi and Himachal Pradesh, and fourteen from Madhya Pradesh, Nagpur, Allahabad, Orissa and Patna. This shows a fairly even representation. There has usually been at least one judge from

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20; B.K.Mukerjea, S.R.Das (later transferred to the East Punjab High Court), A.K.Sarkar, K.C.Das Gupta, R.S.Bachawat, G.K.Mitter, A.N.Ray. Note: S.C.Roy was practising at the Calcutta High Court when he was appointed to the Supreme Court.

21. M.C.Mahajan (Lahore and East Punjab), S.R.Das (East Punjab), J.L.Kapur (Punjab), K.S.Hegde (Delhi), A.N.Grover (Punjab), I.D.Dua (Punjab and Delhi), H.J.Khanna (Punjab and Delhi). S.M.Sikri was Advocate General for the State of Punjab when he was appointed to the Supreme Court.

22. M.H.Beg (originally from the Allahabad High Court).

23. V.Bose, B.P.Sinha, M.Hidayatullah, J.R.Mudholkar; B.P.Sinha came from the Patna High Court and Mudholkar was later transferred to the Bombay High Court.

24. S.J.Imam, B.P.Sinha, S.K.Das, V.Ramaswami.

25. P.Shastri, N.C.Aiyar, T.L.V.Aiyar, P.G.Menon, K.Subba Rao, N.Ayyangar.

26. C.A.Vaidialingam, K.Mathew.

27. K.Subba Rao, P.S.Raju, P.J.Reddy.

the Bombay, Calcutta, Madras and Allahabad High Courts (the oldest High Courts in India), but this practice is no longer followed and in 1970 there was no judge from the Madras High Court. But despite the attempt at some kind of regional representation, Orissa, Rajasthan, Assam and Nagaland have either been unrepresented or represented sparsely.

As regards the educational qualifications of the judges, fifteen received some of their University education in England,[28] and eighteen were called to the Bar at one of the Inns of Court in London.[29] This means that a total of forty per cent of the judges received University or professional education abroad.[30] The rest of the Court were educated solely in India[31] and at least six were scholars of Sanskrit.[32] Only two judges did any post-graduate research. B. K. Mukerjea was a Tagore Law Professor and delivered lectures on the Hindu law relating to religious Endowments[33] and J. M. Shelat wrote a post-graduate thesis

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28. V.Bose (Pembroke, Cambridge), S.K.Das (S.O.A.S. London), S.J.Imam (Trinity, Cambridge), J.L.Kapur (Magdalene, Cambridge), M.Hidayatullah (Trinity, Cambridge), K.N.Wanchoo (Wadham, Oxford), K.C.Das Gupta (Magdalene, Cambridge), J.R.Mudholkar (Sidney Sussex, Cambridge), S.M.Sikri (Trinity Hall, Cambridge), J.M.Shelat (London University), R.S.Bachawat (London University), A.N.Grover (Christ's, Cambridge), A.N.Ray (Oriel, Oxford), P.J.Reddy (Leeds and Trinity Hall, Cambridge), M.H.Beg (Trinity, Cambridge). S. Roy (Univ. College, London)

29. All those in f.n.28 except Wanchoo and S.K.Das. But add the following : Fazl Ali, S.R.Das, A.K.Sarkar, V.Ramaswami, S.C.Roy.

30. 15 went to a University in England - 5 others were called to the Bar in England; but two of the I.C.S. judges who read in England did not qualify at the Bar there.

31. H.Kania, P.Shastri, M.C.Mahajan, B.K.Mukerjea, N.C.Aiya, N.H.Bhagwati, G.Hasan, B.Jaganadhdas, T.L.V.Aiyar, B.P.Sinha, P.G.Menon, P.B.Gajendragadkar, K.Subba Rao, J.C.Shah, R.Dayal, N Ayyangar, P.S.Raju, V.Bhargava, G.M.Mitter, C.A.Vaidialingam, K.S.Hegde, I.D.Dua, K.Mathew, H.J.Khanna, D.G.Parulekar.

32. P.Shastri, B.K.Mukerjea, N.C.Aiyar, T.L.V.Aiyar, P.B.Gajendragadkar, V.Ramaswami.

33. Hindu law on religious and charitable endowments (1951).

on the United States Senate.[34]

Some judges, notably Gajendragadkar, G. Hasan, J. C. Shah and N. C. Aiyar, before their appointment to the Courts had been members of industrial tribunals. This had a significant effect on at least Gajendragadkar's judgements on labour law in the Supreme Court. Fazl Ali, P. G. Menon, S. M. Sikri and K. S. Hegde had represented India at international conferences; N. H. Bhagwati, K. Subha Rao and M. Hidayatullah had been involved in education in various Universities before their appointment.

Very few of the judges have had political experience. B. Jaganadhdas had been imprisoned for the part that he played in the Freedom Movement; J. L. Kapur had some Trade Union backing;[35] P. Shastri had been a member of the Madras Legislative Council and K. S. Hegde alone had been a member of Parliament.

Supreme Court judges are usually appointed between the ages of 53 and 62.[36] The average age on appointment is 57 years. Four judges were appointed to the Supreme Court after they had retired as judges of their respective High Courts.[37] The judges retire at the age of 65. But some judges have accepted office under the government or otherwise. Four died in office,[38] two resigned due to ill health,[39] J. R. Mudholkar resigned to become Chairman of the Press Council;

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34. Criticism and defence of the constitution of the Senate during the campaign for ratification 1787-89. Thesis No. I/TW Dupl. Senate House, University of London.

35. On J.L.Kapur see generally A.I.R. 1949 Jnl. 61. I rely also on information given to me by Kapur J. himself.

36. Hidayatullah was almost 53 when appointed, N.C.Aiyar almost 62.

37. N.C.Aiyar, V.Ramaswami, B.Bhargava, Fazl Ali (appointed to the Federal Court).

38. H.Kania, G.Hasan, P.Menon, P.Raju.

39. B.K.Mukerjea, S.J.Imam.

K. Subba Rao resigned to contest the election for the President of India; T. L. V. Aiyar, J. L. Kapur and Gajendragadkar later became Chairmen of the Law Commission; P. Shastri, S. R. Das, N. Bhagwati, B. P. Sinha and P. B. Gajendragadkar became associated with various Institutes or Universities, Fazl Ali, P. Shastri, S. K. Das, B. Jaganadhdas, J. L. Kapur, became members or Chairmen of several Commissions set up by the Government. Fazl Ali also became the Governor of Orissa and later Assam. By and large Supreme Court judges have not been appointed to purely executive and diplomatic assignments. The only two judges appointed to such positions have come from the High Courts.[40]

Judges have been criticised for seeking appointments to lead to some suitable appointments.[41] The reason for this may be found in the fact that judges in India are very badly paid, have inadequate pensions and leave privileges.[42] The Law Commission[43] and others[44] have criticised the present pay scales. The whole idea that judges should look to the executive for further post-retirement jobs is an unhealthy practice. It is true that Supreme Court judges are suited to posts like Chairman of the Law Commission, but at the same time

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40. M.C.Chagla (of the Bombay High Court) who was given diplomatic assignments in London and Washington and later became Union Minister for Education; S.S.Dhavan (of the Allahabad High Court) who became High Commissioner in London and later Governor of West Bengal.

41. See Setalvad: My life (1971) 509-10. See also Y.P.Dixit: The judiciary and political appointments A.I.R. 1959 Jnl. 2.

42. The salaries have been fixed by the Constitution at Rs, 5000 and Rs. 4000 for the Chief Justice and Puisne Judges respectively. (Article 125). For an account of the pension scheme see Law Commission XIVth Report Vol. I, 43-4.

43. See the Law Commission XIVth Report Vol. 1, 40-46.

44. See Seervai: The position of the judiciary in India (1970) 31-41. P.B.Mukharji: The critical problems of the Indian Constitution (1970) 111-2.

Setalvad's example of a Supreme Court judge who tried to secure his appointment to that post while he was still in the Supreme Court[45] reflects on the system whereby judges retire at the early age of 65[46] and look for other jobs after retirement in an effort to retain the status and privileges which they enjoyed before.

So far thirty-eight judges have been Hindus (seventeen Brahmins), two Christians (V.Bose and K. Mathew) and five Muslims (Fazl Ali, G. Hasan, S. J. Imam, M. Hidayatullah, M. H. Beg). There has always been one Muslim judge in the Supreme Court, and between 1958 and 1962 there were two.

Thus it appears that a Supreme Court judge is usually in his mid-fifties, has been the Chief Justice of some High Court and does not usually have a political background. There is a 40% chance that he may have been educated in England. He could be chosen from anywhere in India but more recruitments have been made from the Calcutta, Delhi (including East Punjab) and Bombay High Courts. Before appointment he may have belonged to several Commissions of Inquiry but this is not essential. During his term and after he tends to write and say very little extrajudicially. But after his term of office there is a good chance that he may be appointed to some post like the Chairman of a Commission. Most of the judges have been Hindus, but the Muslims and the Christians have been represented.

Chief Justices of the Supreme Court are appointed on the basis of seniority and accession to that office depends on how young

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45. Setelvad: My life (1971) at 509-10. The judge in question was Mr. Justice Kapur.

46. The Law Commission XIVth Report Vol. 1 37-38 did not suggest an increase in the retiring age. But see P.B.Mukharji: supra f.n.44 111 suggestion that the retirement age be raised to 70 years for High Court and Supreme Court judges alike. (The present levels are 62 and 65 respectively).

the judge was when he was initially appointed to the Court. Chance plays a very big part. Thus if H. J. Kania had not died in office, L. P. Shastri, M. C. Mahajan and B. K. Mukerjea would not have been Chief Justices of the Court. Again if P. Raju had not died he would have been Chief Justice from July 16, 1973 to August 17, 1973.

A list of the Chief Justices of India and the prospective line of succession is given in Table I below. Table II below gives a quick summary account of the background and careers of all the judges of the Supreme Court of India.

TABLE I showing names and tenure of Chief Justices of India.

Name	Dates from	to
Kania	26. 1.1950	6.11.1951
Shastri	7.11.1951	3. 1.1954
Mahajan	23.12.1954	1. 2.1956
S. R. Das	2. 2.1956	30. 9.1959
Sinha	1.10.1959	31. 1.1964
Gajendragadkar	1. 2.1964	15. 3.1966
Sarkar	16. 3.1966	28. 6.1966
Subha Rao	29. 6.1966	11. 4.1967
Wanchoo	12. 4.1967	24. 2.1968
Hidayatullah	25. 2.1968	17.12.1970
Shah	18.12.1970	21. 1.1971
Sikri	22. 1.1971	due to retire 26. 4.1973

Future line of succession if no deaths or resignations occur and no reforms are carried out in the system, will be :-

Shelat	27. 4.1973	16. 7.1973
Hegde	17. 7.1973	11. 6.1974
Grover	12. 6.1974	15. 2.1977

TABLE II Summary chart showing information on judges of the Court

	1	2	3	4	5	6	7	8	9
Kania	20. 6.46	6.11.51	L		ACJ	B,FC	I	H,B	D
Fazl Ali	9. 6.47	18. 9.51	L		CJ	P,FC	B	M	Ex,C
Shastri	6.12.47	3. 1.54	L		J	M,FC	I	H,B	C,Un
Mahajan	4.10.48	22.12.54	L		J	E,FC	I	H	C
Mukerjea	14.10.48	1. 2.56	L	*	J	C,FC	I	H,B	R
S. R. Das	20. 1.50	30. 9.59	L		CJ	C,E,FC	B	H	Un
Aiyar	23. 9.50	24. 1.53	L		PHC,J	M	I	H,B	C
Bose	5. 3.51	9. 6.56	L	*	CJ	N	UK,B	C	C
Bhagwati	8. 9.52	6. 8.59	L		J	B	I	H,B	Un
Hasan	8. 9.52	5.11.54	L		CJ	Ou,A	I	M	D
Jagannadhdas	9. 3.53	27. 7.58	L		CJ	O	I	H,B	C
Aiyar	4. 1.54	24.11.58	L		J	M	I	H,B	C
Sinha	3.12.54	12. 2.64	L	*	CJ	P,N	I	H	Un
Imam	10. 1.55	1. 2.64	L	AG	CJ	P	UK,B	M	R
S. K. Das	30. 4.56	2. 9.63	ICS		PHC,CJ	P	UK	H	

	1	2	3	4	5	6	7	8	9
Menon	1. 9.56	16.10.57	L	*	J	M	I	H	D
Kapur	14. 1.57	12.12.62	L		J	E	UK,B	H	C
Gajundragadkar	15. 1.57	15. 3.56	L		J	B	I	H,B	UN,C
Sarkar	4. 3.57	28. 6.66	L		J	C	B	H	
Subha Rao	31. 1.58	16. 4.67	L		CJ	M,AP	I	H	R
Wanchoo	11. 8.58	24. 2.68	ICS		CJ	A,R	UK	H,B	
Hidayatullah	1.12.58	17.12.70	L	AG	CJ	N,M,P	UK,B	H	
Das Gupta	24. 8.59	2. 1.65	ICS		PHC,CJ	C	UK,B	H	
Shah	12.10.59	22. 1.71	L		C	B	I	H	
Dayal	27. 7.60	25.10.65	ICS		PHC,J	A	I	H	
Ayyangar	27. 7.60	14.12.64	L		J	M	I	H,B	
Mudholkar	3.10.60	14.12.64	L		PHC,J	N,B	UK,B	H	CPC
Sikri	3. 2.64	26. 4.73	L	AG		Pun	UK,B	H	
Bachawat	9. 7.64	18. 7.72	L		J	C	UK,B	H	
Ramaswami	4. 1.65	30.10.69	ICS		PHC,CJ	P	B	H,B	
Raju	20.10.65	20. 4.66	L	*	CJ	AP	I	H	D
Shelat	24. 3.66	16. 7.73	L		PHC,CJ	B	UK,B	H	

	1	2	3	4	5	6	7	8	9
Bhargava	8. 8.65	5. 2.71	ICS		CJ	A	I	H,B	
Mitter	29. 8.66	24. 9.71	L		J	C	UK,B	H,B	
Vaidialingam	10.10.66	30. 6.72	L	*	J	K	I	H,B	
Hegde	17. 7.67	11. 6.74	L	*	CJ	Mys,D	I	H	
Grover	12. 2.68	15. 2.77	L			E	UK,B	H	
Ray	1. 8.69	29. 1.77	L		J	C	UK,B	H	
Reddy	1. 8.69	23. 1.75	L	*	PHC,CJ	Hyd,AP	UK,B	H	
Dua	1. 8.70	4.10.72	L		CJ	E,D	I	H	
Roy			L			C	UK,B	H	
Khanna			L		CJ	D	I	H	
Mathew			L	AG	J	K	I	C	
Beg			L	*	CJ	B	UK,B	M	
Parulekar			L		PHC,J	B	I	H,B	

Key to TABLE II

Column 1	Date of appointment.
Column 2	Date of retirement or resignation.
Column 3	Whether a lawyer (L) or from the Indian Civil Service (ICS).
Column 4	Whether on the government payroll as a lawyer : * = yes; AG = in the capacity of Advocate General of the State.
Column 5	High Court experience : ACJ = Acting Chief Justice; CJ = Chief Justice; J = Judge PHC = experience in lower courts before joining High Court.
Column 6	High Court before joining Supreme Court : A = Allahabad; AP = Andhra Pradesh; B = Bombay; C = Calcutta; D = Delhi; E = East Punjab; FC = Federal Court; G = Gujerat; HP = Himachal Pradesh; Hyd = Hyderabad; K = Kerala; M = Madras; MP = Madhya Pradesh; Mys = Mysore; N = Nagpur; O = Orissa; Ou = Oudh; P = Patna; Pun = Punjab.
Column 7	Education : B = called to the Bar in England; I = educated solely in India; UK = educated in a University in England.
Column 8	Religion : B = Brahmin; C = Christian; H = Hindu; M = Muslim.
Column 9	Post-retirement career : C = Chairman or member of some Commission; CPC = Chairman of Press Council; D = died in office; Ex = appointed to an executive post after retirement; R = resigned due to ill health or otherwise; Un = appointed to some University position.

5. Voting Behaviour and Patterns of Dissent in the Supreme Court.[1]

Although the large majority of judgements in the Supreme Court are unanimous, there are a number of cases in which dissenting judgements (which differ as to ultimate result reached) and separate opinions (which concur in the result but for different reasons) have been read by various judges.

In America, dissenting opinions play an important role in evaluating the wisdom of the majority views, and sometimes even supersede the majority judgements as time rolls on.[2] An Indian commentator has argued that dissents have played a similar role in India.[3] This in fact is not so. His example of K. Subha Roa J.'s dissent in M. S. N. Sharma v S. N. Sinha[4] becoming the majority view in the Advisory Opinion in In re Article 143,[5] hardly bears this out because in the latter case reliance is also placed on the majority view in M. S. N. Sharma's case.[6] In effect the Court in In re Article 143 came to some of K. Subha Rao J.'s conclusions quite independently.[7]

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1. There are only two existing analyses of this: G.H.Gadbois: Selection, background, characteristics and voting behaviour of Indian Supreme Court judges - 1950-59 (in Schubert & Danelski (ed.) Comparative judicial behaviour (1969) O.U.P.) 221; D.C.Jain: Dissenting opinion and constitutional revolution in U.S.A. and India (1969) IX Jai.L. Jnl. 113 (hereafter Jain (1969)).

2. See C.E.Hughes: The Supreme Court and the United States (1928) 68; R.Pound: Preface to Justice Musmano's Dissents (1956 Indianapolis); T.R.Powell: The logic and rhetoric of constitutional law (1918) 15 Jnl. of Philosophy, Psychology and Scientific Methods 645. All these are quoted by D.C.Jain (1969) at 113.

3. D.C.Jain (1969) 113 at 114.

4. A.I.R. 1959 S.C. 395 see D.C.Jain (1969) at 118-9.

5. A.I.R. 1965 S.C. 745 (per Gajendragadkar J for Subha Rao J. amongst others).

6. Ibid at pr. 54 p.765.

7. Ibid at pr. 50 p. 765 (Subha Rao J.'s most important point about the paramountcy of fundamental rights is not acceded to).

There is in fact hardly any pattern of sustained dissent in the Indian Supreme Court. Judges put forward token dissents which do not outlive the judgements they are inserted in, because the authors of the dissents readily abandon their dissents in later cases on the same subject which they participated in. Thus Fazl Ali J.'s powerful dissent in Gopalan v Madras[8] is abandoned in later preventive detention cases.[9] Again Shastri and Das JJ, dissented in Bombay v. Atma Ram[10] on whether grounds should be supplied to a preventively detained person, is happily abandoned in later cases.[11]

Even K. Subha Rao J. who is usually consistent[12] can be accused of writing dissents which he later abandons.[13] In fact with Subha Rao J. (as we shall later see) this becomes something of a technique. He mentions a point (whether in a dissenting or majority

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8. A.I.R. 1950 S.C. 27

9. See Bombay v Atma Ram A.I.R. 1951 S.C. 157; Tarapade De v Bengal A.I.R. 1951 S.C. 174.

10. A.I.R. 1951 S.C. 157 (They also dissented in the companion case of Tarapade De v Bengal A.I.R. 1951 S.C. 174).

11. See Ujagir Singh v Punjab A.I.R. 1952 S.C. 350 at 354 (where they accede to the majority view).

12. e.g. His 1:4 dissent on the power to tax by delegated legislation in Vasan Lal v Bombay A.I.R. 1961 S.C. 4 became a 2:3 dissent in Calcutta Municipal Corpn. v Liberty Cinema A.I.R. 1965 S.C. 1017 (where Ayyangar J. wrote the judgement) to become a unanimous decision in Devi Das v Punjab A.I.R. 1967 S.C. 1895. On these cases see G.S.Ullal: Do judges live in an ivory tower ? A.I.R. 1968 Jnl. 37.

13. e.g. his dissent in Somawanti v Punjab A.I.R. 1963 S.C. 151 is abandoned in later cases on the same subject (i.e. Valji Bhai v Bombay A.I.R. 1963 S.C. 1890; Raja Anand v U.P. A.I.R. 1967 S.C. 1081) where the court found a result satisfactory to Subha Rao J. but for different reasons.

judgement) then forgets about it only to mention it in another context as an established rule.[14]

In fact, in India most of the constitutional change has come from Unanimous or majority judgements. Apart from Subha Rao J. a large part of the dissents have come from Bose, Sarkar and Dayal JJ. But it cannot really be shown that the opinions of these judges became the opinion of the court. Even Subha Rao J. has introduced most of his new interpretations to the Constitution in majority judgements. So much so, that on at least two occasions Hidayatullah J, who had concurred in his judgement, had cause to plead confusion and state that he did not subscribe to some of the wide propositions in the judgements which he had assented to.[15]

Dissent is usually on a specific non-recurring matter,[16] or of a token nature, where the judge merely expresses another point of view, and having made his point makes no attempt to try to get the others to adopt his opinion.

Given below is a Table I showing the frequency of dissents and separate judgements.

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14. e.g. in Kochunni v Madras A.I.R. 1960 S.C. 1080 he introduced the "agrarian reform test" which he made into a rule in Vajravelu v Madras A.I.R. 1965 SC1017 despite limited challenge to Subha Rao J.'s methods in Ranjit Singh v Punjab A.I.R. 1965 S.C. 632.

15. See Mohd. Yaqub v J.K. A.I.R. 1968 S.C. 765 at pr. 21 p. 771.

16. e.g. the dissent of Kapur J. on the pardoning power of the Governor in K.M.Nanavati v Bombay A.I.R. 1961 S.C. 112.

TABLE III showing frequency of dissenting and separate opinions.

Year	1	2	3	4	5	6
1950	41	4	5	8	22.8	41.5
1951	41	0	7	5	17.1	29.3
1952	68	1	5	5	8.09	16.4
1953	85	1	3	5	3.5	9.4
1954	78	5	0	3	6.4	10.3
1955	175	9	1	5	5.7	8.5
1956	61	2	0	3	3.27	4.2
1957	72	1	0	2	1.4	4.2
1958	85	9	0	1	10.6	11.8
1959	186	7	3	10	5.37	10.75
1960	211	16	2	5	8.5	10.9
1961	228	17	7	2	10.5	11.4
1962	401	33	3	10	8.9	11.5
1963	266	26	4	5	11.2	13.2
1964	446	35	10	19	10.9	12.1
1965	243	22	1	10	9.5	13.6
1966	223	26	5	12	13.9	19.3
1967	289	14	3	2	5.9	6.3
1968	263	5	2	3	2.7	3.8
1969	313	3	1	7	1.24	3.6
1970	323	7	0	1	2.17	2.47
TOTALS	4,828	243	62	123		

1. Total number of cases reported in that year.

2. Total number of two judgements dissents.

3. Total number of multi-judgement dissents (more than two judgements).

4. Total number of cases where separate opinions given though the result is concurred in.

5. Percentage of 2+3 to 1.

6. Percentage of 2+3+4 to 1.

Source: Extracted from the Supreme Court Reports 1950-1970. The difference between these figures and those of Gadbois (supra f.n.1) is that his are computed on the basis of date of decision, whereas the above are on the basis of date of Report.

We will see that a large part of the dissenting or separate opinions were delivered in the years 1950-55 and 1960-67. During the former period (1950-55) the court had just been inaugurated and everyone on the Bench wanted to express his opinions.[17] We will therefore notice a large number of separate opinions rather than dissents in that period. Most of the cases are usually on Constitutional Law. In the latter period controversy may well have resulted from the fact that the number of judges had been increased in the Court by two Acts in 1956 and 1960.[18] The major dissents are still on Constitutional matters, but there are also cases where the dissent has been on a point of law concerning Hindu law[19] or the law of Torts[20] or Contract.[21]

The voting pattern also shows that dissents are usually bne dissents, where simply one judge dissents. This is illustrated in Table IV below.

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17. Thus in the Advisory Opinion in 1951 (A.I.R. 1951 S.C. 332) all the 7 judges gave their opinion, although 5 of them substantially agreed with each other. In two later Opinions (Re Kerala Education Bill A.I.R. 1958 S.C. 956; Re Berubari Union A.I.R. 1960 S.C. 845) only one opinion was given. In Re Sea Customs Act A.I.R. 1963 S.C.1760 4 opinions were read for 9 judges, and in the controversial Advisory Reference concerning Parliamentary Privileges (Re Article 143 A.I.R. 1965 S.C. 745) only 2 opinions (one majority and one minority) were read.

18. See Supreme Court (Appointment of Judges Act) 17 of 1960.

19. See Hegde J.'s dissent in V.D.Dhanwatey v Commr. A.I.R. 1968 S.C. 683

20. See for example Sitaram v Santanu Prashad A.I.R. 1966 S.C. 1697.

21. See for example East India Commercial Co. v Collector of Customs A.I.R. 1962 S.C. 1893; W.B. v B.K.Mondal and Sons Ltd. A.I.R. 1962 S.C. 779.

TABLE IV voting pattern in dissenting judgements

Nature of voting split	Number of such decisions
2 : 1	103
3 : 1	7
4 : 1	110
5 : 1	5
6 : 1	6
8 : 1	2
10 : 1	1
3 : 2	59
5 : 2	4
7 : 2	1
4 : 3	5
8 : 3	1
6 : 5	1
Total	305

Source : Calculated from the Supreme Court Reports 1950-1970

We will see that the dissenting judge is usually unsupported. 70.1% of the dissents are one judge dissents whereas only 19.3% of the cases record a voting pattern of two judge dissents (i.e. where the vote is 3:2). This substantiates our earlier point that the pattern of dissent is not always organised amongst the judges but is of an extremely individual nature, and usually a one case token dissent.

Given below is Table V which shows the voting, dissenting and judgement writing pattern in the Court.

TABLE V showing voting, dissenting and judgement writing pattern.

	1	2	3	4	5	6	7	8	9
Kania	51	23	16	8	7	1	1	9	5
Fazl Ali	87	43	14	6	2	6	6	12	4
Shastri	133	56	28	13	8	7	6	17	15
Mahajan	242	102	23	5	7	11	10	16	10
Mukerjea	246	79	26	10	11	5	4	18	9
S. R. Das	446	129	47	24	17	6	6	34	22
N. Ayyar	85	27	11	3	7	1	1	9	4
Hasan	129	25	9	1	7	1	1	8	3
V. Bose	269	82	31	5	15	11	11	16	10
Bhagwati	326	81	20	7	9	4	0	12	6
Jaganadhdas	162	43	9	0	2	7	0	7	4
T. L. V. Aiyar	242	91	21	5	12	4	0	7	3
B. P. Sinha	584	117	64	14	42	6	2	2	4
S. J. Imam	286	50	27	5	20	1	1	14	3
S. K. Das	445	142	59	24	27	8	7	11	5
P. G. Menon	49	9	0	0	0	0	0	1	1
J. L. Kapur	425	149	57	26	18	13	12	10	6
P. B. Gajendragadkar	987	336	65	25	39	1	0	18	7
A. K. Sarkar	514	185	92	25	32	45	41	38	26
K. Subba Rao	769	286	116	29	34	53	49	26	18
K. N. Wanchoo	812	274	76	18	48	10	8	31	13
M. Hidayatullah	935	391	86	30	19	37	31	25	18
K. C. Das Gupta	498	131	40	9	19	13	8	15	1
J. C. Shah	1387	473	88	30	31	27	24	27	18
N.R.Ayyanga	454	129	58	14	31	13	12	18	10
R. Dayal	431	136	64	13	21	30	25	18	9
J. R. Mudholkar	451	135	62	12	31	19	16	27	18
S. M. Sikri	617	155	41	12	25	4	4	15	4

TABLE V continued

	1	2	3	4	5	6	7	8	9
R. S. Bachawat	386	154	43	13	15	15	14	17	14
V. Ramaswami	638	198	23	3	11	9	6	5	4
P. S. Raju	46	6	3	0	2	1	1	1	0
J. M. Shelat	271	99	16	4	6	6	4	4	2
Bhargava	258	89	6	2	3	1	1	3	3
G. K. Mitter	275	43	11	3	6	2	1	6	2
C. A. Vaidialingam	192	51	12	1	9	2	0	2	0
K. S. Hedge	252	92	11	3	1	7	6	6	4
Grover	263	72	4	1	2	1	1	3	1
P. J. Reddy	35	8	3	0	0	0	0	0	0
I. D. Dua	58	16	2	0	0	0	0	1	0

1. Total number of cases participated in.
2. Total number of judgements written.
3. Total number of split decisions (dissents).
4. Number of majority judgements delivered of cases in column 3.
5. Number of majority votes without judgement of cases in column 3.
6. Number of minority (dissenting) votes of cases in column 3.
7. Number of minority judgements of those in column 6.
8. Number of split decisions where separate judgement but no dissent.
9. Number of judgements written in cases in column 8.

Note : Judgements in columns 4 and 9 can be the main or the minority judgement in the case.

Source: Extracted from Supreme Court Reports 1950-70.

We can see from Table V that the major judgement writers in the Court in the early years were Shastri, Mahajan and S. R. Das. Later on the majority writers were Gajendragadkar, Subba Rao, Wanchoo, Shah and Hidayatullah JJ. Setalvad's opinion that B. P. Sinha shirked the responsibility of writing judgements is borne out by the facts in the Table.[22] We will notice that the majority judgement writers are in the main judges who later on became Chief Justices of the Court. This may well be due to the fact that these judges spend more time in the Court, but their contribution is disproportionate, which suggests that these judges know well in advance that they are going to be Chief Justices of the Court and tend to dominate the business of the Court. This reflects badly on the nature of the system of appointing the Senior Judge Chief Justice.[23]

The major dissenting judges have also been judges who later became Chief Justices of the Court (Shastri, Mahajan, Das, Sarkar, Subba Rao, Hidayatullah, Shah). There are however exceptions to this pattern. In the early years, Bose J. wrote dissenting judgements in 11 cases (most of which were concerned with the issue of personal liberty[24]). In later years there were a large number of dissenting judgements by Kapur J. His dissents are not bound together by a theme and stretch from issues in Constitutional Law[25] to problems of Official Secrecy as laid down in Section 123 of the Evidence Act, 1872.[26]

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22. Setalvad: My Life (1971) 428.

23. See also the comments in the XIVth Report of the Law Commission Vol. I, pp 39-40.

24. See Gadbois (supra f.n.1) at p. 242-245.

25. e.g. K.M.Nanavati v Bombay A.I.R. 1961 S.C. 112.

26. Union v S.S.Singh A.I.R. 1961 S.C. 493. Kapur J. was very fond of upholding the English Law on a particular issue - See Setalvad: My Life (1971) quoting Das C.J. at 367 (an extrajudicial comment).

The other major dissenting patterns have been the judgements of Subha Rao and Shah JJ. (whose main theme of dissent was that the individual rights are important) and Sarkar and Hidayatullah JJ. which cover a vast number of topics. The contribution of Subha Rao and Hidayatullah JJ. is well known, but that of Sarkar J. is usually overlooked. We will later see, in Chapter III, that Sarkar J. played an important role in developing the law of property, even though his dissents never became the opinion of the Court. Bachawat and Dayal JJ. also wrote some dissenting opinions in some important cases.[27]

We can see that the technique of dissenting in a case has not in fact matured as an important technique by which the judges in the Court have made their opinions felt. Judges like Subha Rao J. have sometimes made their presence felt but this has usually been as majority judgement writers. The present "seniority" system has encouraged a pattern of judgement writing, where prospective Chief Justices play an extremely important role.

Thus we can see that in the main the Court appears not to have relied on the technique of dissenting and separate opinions to achieve a constant dialectic in the Court. It is possible that a lot of discussion takes place between the judges before a judgement is written. But this seems unlikely in view of the statement by Sikri C.J. that a Supreme Court judge is usually responsible for at least 15 judgements a week ! Again we have already seen how Hidayatullah J. has hinted on one occasion that the judgement he subscribed to did not contain so wide a proposition as the judgement

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27. Note Dayal J.'s dissenting judgement in R.M. Lohia v Union A.I.R. 1966 S.C. 740, and Bachawat J.'s dissent in Golak Nath v Punjab A.I.R. 1967 S.C. 1643.

which was actually read in Court.[28] For a realistic analysis of the Court's decision making habits, we have to look more at the techniques which they actually use rather than the patterns of dissent. To these we now turn.

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28. See Mohd. Yaqub v J.K. A.I.R. 1968 S.C. 765 at pr.21 p.771. See also Gujerat v Shantilal A.I.R. 1969 S.C. 634 at Pr.1.

CHAPTER II

AN EXAMINATION OF SOME OF THE JURISTIC TECHNIQUES USED BY THE SUPREME COURT AND OTHER COURTS IN INDIA

1. The Doctrine of Precedent in India.

a. The need to follow precedent.

The publication of innumerable Digests[1] in India bears testimony to the fact that Indian lawyers tend to be precedent minded. Despite this only one serious attempt has been made to analyse the theory of precedent in India.[2] There has been, however, the odd stray article on the subject[3] and the Digests contain a vast compendium on the subject of precedent.[4] This reliance on precedent is perhaps in keeping with Hindu and Islamic jurisprudence, both of which lay considerable emphasis on relying on earlier texts and ostensibly treat such texts as of a binding nature.

We have moved very far from the Blackstonian fiction that judges merely declare the law.[5] It is now accepted that judges rely on precedent but at the same time are able to devise ways and means to get away from the binding effect of what they feel is a bad precedent. More recently

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1. See for example the All India Reporter Digests 1950-65; 1965-70.

2. I.C.Saxena: The doctrine of precedent in India in (G.S.Sharma (ed)) Essays in Indian jurisprudence 110-136, reprinted at (1963) III Jaipur Law Journal 188-214. This contrasts with the wealth of English law on the subject, on which see Winfield: History of Judicial precedent (1931) 46 L.Q.R. 207; Allen: Law in the making (7th ed) Chapter III where a historical account of the doctrine of precedent is given. See also references cited infra.

3. See for example Seervai: Justice, law and precedents in India (1964) 66 Bom.L.R.Jnl. 65-73; T.Ramalingam: The Supreme Court of India and the doctrine of stare decisis (1965) S.C.J. Jnl. 9. This is a comment on Bengal Immunity Co. v Bihar A.I.R. 1955 S.C. 661; V.A.Venkatachalam: Binding force of High Court decisions (1969) 1 M.L.J.Jnl. 65; Scope for reconsideration A.I.R. 1970 Jnl; 40; Binding nature of precedent (1969) 73 C.W.N. Jnl. 1 39; G.Sitamasastry: English precedent and the judicial process in India (1969) Lawyer 119-125. See also the articles on prospective overruling, cited infra, on Golak Nath's case, Chapter VII, Section I (iv).

4. See A.I.R. Digest 1950-65 Vol.12, 630-669; see also on Article 141 of the Constitution Vol.IV, 514-519.

5. Blackstone (1765) I Comm. 63-4, 68-71; Hale: History of the Common Law (1820 Ed.) 89. Note also Bentham s comments on the ill effects of the retroactive nature of overruling an earlier case at Volume V Works (Bowring Edn.) 225. Note Austin II Jurisprudence (1873 Edn.) Lecture 29 pp. 547-8 where he suggests that earlier case law should be departed from only "obliquely".

critical literature[6] has accumulated against the doctrine of precedent, and recent case law[7] suggests judges are prepared (though with important reservations[8]) to use the doctrine of precedent merely to perform the function of maintaining a continuity in the law without allowing the doctrine to prevent them from dissenting from the view in an earlier case. More recently, in Jones v Secretary of State (1972)[9] two judges of the House of Lords were prepared to consider whether the American doctrine of prospective overruling should apply to England. Indian Courts have in fact accepted both these important modifications to the general theory of precedent, which they inherited from English law.

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6. See Cardozo: The nature of the judicial process (1921) Chapter IV. Note the following comment at p.150 "But I am ready to concede that the rule of adherence to precedent though it ought not to be abandoned, ought to be in some degree relaxed." Report of the Cincinatti Conference on the status of judicial precedent (1940) 14 Univ.of Cin.L.Rev. 203-355; Holdsworth XII H.E.L. 159; also 50 L.Q.R. 180 at 183 where he quotes Coke to say that a bad precedent should be overruled. Allen: 51 L.Q.R. 40 and 196; Wright: Future of the Common Law 8. See also generally Rupert Cross: Precedent in English Law (1968 Edn.) 32-34, and Chapters 6, 7 and 8; Salmond: Jurisprudence (12d) 141-188; Paton: Jurisprudence (3d) 179-94; Julius Stone: Legal systems and lawyers' reasonings (1964) Chapter 7, Section 3, pp. 281-300.

7. See for example the Practice Statement of the House of Lords in which they gave themselves the power to overrule earlier decisions (1966) 3 All.E.R. 77 I. W.L.R. 1234. On the position before 1966 and the way in which the House avoided the consequences of a strict theory of stare decisis see Dworkin: Stare decisis in the House of Lords (1962) 25 Mod.L.R. 163-178. See also the House using the power it acquired in 1966 in ConwayvRimmner (1968) I All.E.R. 874. On the Court of Appeal see Gallie v Lee (1969) 2 Ch.17; Broome v Cassels Ltd. (1971) 2 W.L.R. 853 where it stated that an earlier decision of the House of Lords was per incuriam and refused to follow it.

8. See the recent decision in Cassels Ltd. v Broome (1972) Feb.24, 1972 Times p. 27 where the House of Lords reproved the Court of Appeal for not following precedent.

9. (1972) I All.E.R. 145 - Lord Diplock at 188-9; Lord Simon at 198-9.

b. Stare decisis and the Indian Supreme Court.

Courts in India have always defended the doctrine of precedent on the ground that the law must be certain. In Keshava Mills v I.T.Commr.[10] Gajendragadkar J.laid down a number of reasons for not overruling a case.[11] He further added :

> " ... unless considerations of a substantial and compelling character make it necessary to do so, this Court would be reluctant to revise its earlier decisions." 12.

The question whether an earlier decision can be overruled was first considered by the Court in Bengal Immunity Co. v Bihar (1955)[13] where a minority of 3 out of 7 judges stressed that the power to overrule a case must be exercised very sparingly.[14] The minority judges are referred to to counteract the impression that Subha Rao J. gave in Golak Nath v Punjab[15] that in the Bengal Immunity case all the judges were in favour of abandoning an earlier view if they had the slightest doubt about it. The Supreme Court has always emphasised that overruling must be done with caution.[16] This is apparent from the view of the majority and the

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10. A.I.R. 1965 S.C. 1636.

11. Ibid at pr. 23 p.1644 col. 2.

12. Ibid at pr. 25 p. 1645.

13. A.I.R. 1955 S.C. 661.

14. See T.L.V.Aiyar J. at pr. 186 p. 743; Sinha J. at pr. 213, p. 755; Jaganadhdas J. at pr.115-28 p.711-18

15. A.I.R. 1967 SC1643 at pr. 57 p. 1670-1. Subha Rao J. also quoted from his own judgement in W.B. v Corpn. of Calcutta A.I.R. 1967 S.C. 997 which deals with the majority's view of stare decisis in the Bengal Immunity case. Note the views of Wanchoo and Ramaswami JJ in Golak Nath v Punjab (supra) at pr. 118 p. 1690-1 and pr. 277, 1742 respectively.

16. On this see Das C.J. In Bengal Immunity Co. v Bihar A.I.R. 1955 S.C. 661 at pr. 11-21 pp. 670-1 particularly pr. 19; Gajendradkar J. in Sajjan Singh v Rajasthan A.I.R. 1965 S.C. 845 at pr. 22, Mudholkar J. in Vidyacharan v Khub Chand A.I.R. 1964 S.C. 1099 at pr. 40 p. 1116-7; Subha Rao J. in Corpn. of Calcutta v W.B. A.I.R. 1967 S.C. 997 at pr. 5 1001; see also Shah J in the same case at 1013. See also Gajendragadkar J. in Maktul v Manbhari A.I.R. 1958 S.C. 918 at pr. 9 pp. 922-3 where English and American authority supporting stare decisis are cited. See further V.D.Dhanwatey v C.I.T. A.I.R. 1968 S.C. 683; Shama Rao v Union Territory, Pondicherry A.I.R. 1967 S.C. 1480.

minority in Tuticorn v T. S. D. Nadar.[17] In that case Hegde J. went on to say :

> "Every time t(he) Court overrules its previous decision, the confidence of the public in the soundness of the decisions of this Court is bound to be shaken." 18

The High Courts have similar observations.[19]

Despite this declared sensitivity to the need for precedent, the Supreme Court appears to have overruled itself in a large number of cases. This is illustrated in a chart below.

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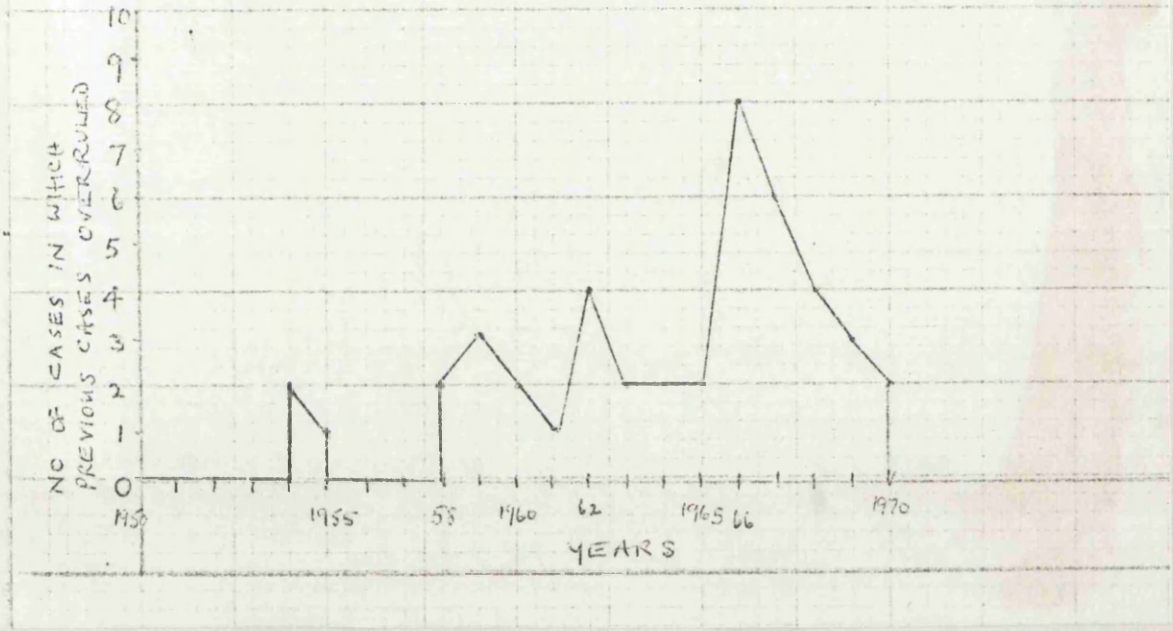
17. A.I.R. 1968 S.C. 623 at pr. 4 p. 627 and prs. 37-8 pp. 637-8 respectively.

18. Ibid at pr. 37-8.

19. P.J.Reddy C.J.; in S. Rao v Revenue Divisional Officer Guntur A.I.R. 1969 A.P. 55 (F.B.) at pr. 7 p. 59 (but he stresses that in the instant case there was scope for more than interpretation); N.G.Shelat J. in State v Saifuddin A.I.R. 1969 Gujerat 195 at pr. 9 p. 199 noting that a F.B. decision should not be disturbed unless "a public interest of a very serious nature is seriously affected"; U.P. v Firm Deo Dutt A.I.R. 1966 All. 73 per Desai C.J. at pr. 22 p. 79-80; Bassappa v Parvatamma A.I.R. 1952 Hyd. 99 at pr. 6 p. 103; (per Ali Khan J.) at pr. 40 p.111 (per Manohar Pershad J.); Chagla C.J. (for Gajendragadkar and Tendolkar JJ) in Sarkar v Chand Narayan A.I.R. 1951 Bom. pr.10 p.13 col. 2; Rama Krishna v Hardcastle &Co.A.I.R. 1963 Madras 103 at pr. 5, p.105 where blind adherence to precedent is disapproved. Peramanayakam v Sivaram A.I.R. 1952 Mad. 419 at pr. 80 pp. 453-4 (per Raghava Rao J.) that precedent should be followed.

Chart showing the extent to which the Supreme Court has overruled itself.



The chart has been tabulated in the form of a table which gives the exact figures from year to year.

	SC	PC		SC	PC
1950	0		1961	1	
1951	0		1962	4	
1952	0		1963	2	
1953	0		1964	2	
1954	2		1965	2	
1955	1		1966	8	
1956	0		1967	6	3
1957	0		1968	4	
1958	2		1969	3	
1959	3		1970	2	2
1960	2				

Source of the Table

The main sources of the table are the lists in each annual volume of the A.I.R. Supreme Court. The following additions have been made. Deep Chand v U.P. A.I.R. 1959 S.C. 648 is taken to have overruled Bhikajee v M.P. A.I.R. 1955 S.C. 781 on the strength of Das Gupta J.'s observations in M/S N. K. Bhawani v Chief Tax Officer A.I.R. 1961 Mys. 3 at pr. 7; Kochunni v Madras A.I.R. 1960 S.C. 1080 is taken to have overruled Bhanji Munji's case, A.I.R. 1955 S.C. 41; In 1962 the A.I.R. includes Automobile Transport Co. v Rajasthan A.I.R. 1962 S.C. 1406 as having overruled earlier case law, by having distinguished it. On this basis we have included Sitabati v W.B. (1961) reported (1967) II S.C.R. 945 as having in at least one sense tried to modify fundamentally Kochunni v Madras A.I.R. 1960 S.C. 1080 on which see the recent case of R.C.Cooper v Union A.I.R. 1970 S.C. 564; In 1965 we have included Kasturi Lal v U.P. A.I.R. 1965 S.C. 1039 as having overruled Vidyawati's case A.I.R. 1962 S.C. on the strength of Dhavan J.'s observations in Chottey Lal v U.P. A.I.R. 1967 All 327 at pr. 10. p. 329. In 1966 we have included Manikayaka v Narasimhaswami A.I.R. 1966 S.C. 470 as having overruled earlier case law on the strength of Jagat Narain J.'s judgement in Sachidanand v Mangilal A.I.R. 1968 Rajasthan 1. In 1967 we have included Golak Nath v Punjab A.I.R. 1967 S.C. 1643 which appears to have been overlooked in the A.I.R. list. In that same year we have included Devi Dassan v Punjab A.I.R. 1967 S.C. 1896 on the strength of an article by G.S.Ullal: Do judges live in an ivory tower ? A.I.R. 1968 Journal.37.

It should also be noted that in the 1954 list we have included Dwarkadas etc. v Sholapur Spg. and Wvg. Co. A.I.R. 1954 S.C. 119 having overruled Chiranjit Lal v Union A.I.R. 1951 S.C. 41 on the question of shareholders' rights. Further we have stressed that Subodh Gopal v W.B. A.I.R. 1954 S.C. 92 overruled Das J.'s views on the relation between Article 331 (1) and (2) inter se in the aforementioned 1951 case, even though his views had not at any stage become the views of the Court. What is to be noted is the apologetic manner in which the rest of the Court dissented from the views of a brother judge.

In 1970 we have added that the Supreme Court has overruled 2 Privy Council's decisions in Raman Nadar v S. Raslamma A.I.R. 1970 S.C. 1759 and Raj Kumar v C.I.T. (1970) 1 S.C.W.R. 674.

It will be noticed that the Court began to overrule itself in 1954. There was a short lull from 1956-60 and since then there has been a steady stream of overruling. It should be noted that these dates accord with the appointments of new judges to the Court. The early Court was small and compact and all the judges usually sat together. A large number of appointments were made to the Court in 1954.[20] After that the Court lost its compactness and began sitting in Benches that were changed with increasing frequency. The next set of appointments was made in 1957-8.[21] After 1960 the number of judges was increased to thirteen (it was originally five in 1950),[22] and new appointments were frequently made to the Court.[23] The significance of this can be seen later in the cases on agrarian reform in Chapter II. We will see that in Kochunni v Madras (1960),[24] Sarkar J. protested at the majority's effort to add the test of agrarian reform in cases where Article 31A would technically apply. But neither Imam J (who concurred in his judgement) nor he ever participated in any case in which the agrarian reform test came up for discussion. The majority view became the law without further protest. Again, in two very important cases on the Constitution the Court overruled earlier case law by merely a bare majority.[25] It appears that in India the authority of an earlier case is really at the mercy of the manner in which a particular Bench is

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20. See Chapter I Section 4.

21. See Chapter I Section 4.

22. By the Supreme Court Act (13 of) 1960. Note that in 1950 the maximum limit set by the Constitution was 7 (excluding the Chief Justice).

23. See Chapter I. Section 4.

24. A.I.R. 1960 S.C. 1080

25. Bengal Immunity Co. v Bihar A.I.R. 1955 S.C. 661 (majority 4:3); Golak Nath v Punjab A.I.R. 1967 S.C. 1643 (majority 6:5).

constituted. The most startling examples of this are two cases on the relationship between Articles 19 and 31(2).[26] Shah J. delivered the judgement in both cases. In the first case, he respected the authority of a 1961 decision[27] and ruled that the two Articles were not related to each other but in the second case, in the company of a much larger Bench and in a changed situation two years later, he distinguished and overruled the 1961 case in the briefest possible terms. Another good example is W. B. v Corpn of Calcutta[28] where a different Court overruled a 1960 case and with it dispensed with the common rule of interpretation that the Crown is not bound by a Statute.

The Court seems to have attained some kind of compromise between the need for certainty and what W. Douglas J. in an extra judicial comment called the "dynamic component of history".[29] But it should be noted that the Court has not in fact laid down clear principles as to when it shall depart from a case. It has in the past often overruled earlier authority with very little discussion.[30] The Court must, as the House of Lords is trying to do,[31] evolve definite principles on

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26. Maharashtra v H.N.Rao A.I.R. 1970 S.C. 1157 (reported 2 years late); R.C.Cooper v Union A.I.R. 1970 S.C. 564.

27. Sitabati v W.B. (1962) reported (1967) II S.C.R. 945.

28. A.I.R. 1967 S.C. 997.

29. Stare decisis (1949) 49 Col.L.Rev. 735 at 736.

30. e.g. M.S.N.Sharma v Sri Krishna Sharma A.I.R. 1959 S.E. 395 on Ganpati v Nafisul Hasan A.I.R. 1954 S.C. 636; Deep Chand v U.P. A.I.R. 1959 S.C. 648 on earlier case on the doctrine of eclipse. Dhaneshwar v Delhi Adm. A.I.R. 1962 S.C. 795 at pr. 4 p. 198; Kulakhil v Kerala A.I.R. 1966 S.C. 1614 on which see comment A.I.R. 1967 Jnl. 56; Note the unsatisfactory way in which Gopalan v Madras A.I.R. 1950 S.C. 27 is overruled in R.C.Cooper v Union A.I.R. 1970 S.C. 564 (a case which did not even concern Gopalan directly) at pr. 64 p. 597.

31. Jones v Secy of State (1972) 1 All.E.R. 145. See particularly Lord Simon at 196-7.

Whether an earlier case should be followed or not. It will be clear from later chapters of this thesis that even the Court's citing of its earlier case law on the subject has been very selective. To give one example : the leading case on the doctrine of colourable legislation is quite clearly Kameshwar v Bihar;[32] but the principles in that case were somewhat widely expressed and this was obliquely pointed out in Gajapati v Orissa.[33] In future the latter and not the former case was cited as the leading authority on colourable legislation, even though the doctrine was in fact used in the former and not in the latter case. Casual overruling and selective citing of case law has become an important feature of the use of the doctrine of precedent in the Supreme Court. This will be pointed out later.[34]

c. The Supreme Court and the "interhierarchical" structure of precedent.

Despite the fact that the Supreme Court has not followed the doctrine of stare decisis very strictly, it has been severe in reproving single judges who have stepped out of line and not followed earlier Division and Full Benches of their own Court.

The High Courts have in the past followed the rule that a single judge of that Court is bound by an earlier Division Bench (of that Court)[35] which is in turn bound by an earlier Full Bench.[36] The

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32. A.I.R. 1952 S.C. 252.

33. A.I.R. 1953 S.C. 375.

34. See Chapter III Section 3(iii)(a)

35. See on this article by A High Court Judge: Binding nature of judgements in High Courts A.I.R. 1963 Jnl. 42-44; see also Ramazan v Bhimson A.I.R. 1970 Mys. 195 (or a Supreme Court decision) at pr. 8 pp. 197-8.

36. See article by A High Court Judge cited f.n. 35 and also A.I.R. 1971 Orr. 127; A.I.R. 1971 Allahabad 251; A.I.R. 1971 Bomb. 317. But see that these rules do not apply where there is a Supreme Court decision on a point. Aleka v Jagabandhu A.I.R. 1971 Orr. 127 at pr. 11 p.137; I.C.House v S.T.Officer A.I.R. 1971 All 250 at pr. 3 pp. 252-3; Trustees, Port of Bombay v Premier Automobiles A.I.R. 1971 Bom. 317; Punam Chand v Subhakaran A.I.R. 1969 S.C. 547 at pr. 8 p.549-50.

Supreme Court have approved of this set-up.[37] But more recently two judges, one from Allahabad and the other from Gujerat, have not followed these rules. We will trace the manner in which the Supreme Court dealt with these "revolts" by the Single Judge.

(i) The Revolt of the Single Judge.

Dhavan J. of the Allahabad High Court and Raju J. of the Gujerat High Court have both at different times refused to follow Division and Full Benches of their own High Courts. The former granted leave to appeal to the Supreme Court without referring his doubts to a larger Bench on the grounds that it would take too much time.[38] The latter, however, took the view that the terms of his oath of office required him to uphold the Constitution and he would not subscribe to any view of law which he thought was unconstitutional. He agreed however to abide by the decisions of the Supreme Court because Article 141 of the Constitution specifically mandates him to do so. Raju J. has consistently taken this view in five reported and unreported decisions.[39]

In Sri Bhagwan v Ramchand[40] Gajendragadkar J. agreed in substance with the conclusion that Dhavan J. reached on whether a Magistrate refusing to grant permission to evict a tenant was bound by the rules of natural

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37. Jai Kuer v Sher Singh A.I.R. 1960 S.C. 1118 at 1122-3; Kamalammal v Venkatalakshmi A.I.R. 1965 S.C. 1349; Raghavamma v Chenchamma A.I.R. 1964 S.C. 136; Mahadeolal v Adm.Gen. A.I.R. 1960 S.C. 936; Jaisri v Rajdewan Dubey A.I.R. 1962 S.C. 83; Sri Bhagwan v Ramchand A.I.R. 1965 S.C. 1767; Tribhowani Das v State A.I.R. 1968 S.C. 372; Dhanki Mahajan v Rana Chandubhan A.I.R. 1969 S.C. 69.

38. Shri Bhagwan v Ramchand (1963) All.W.R. (H.C.) 525.

39. Dhanki Mahajan v Rana Chandubhan; Civil Rev.Ptn. 477 (1960) ref. to in A.I.R. 1969 S.C. 69; Mangulbhai v Gujerat Rev. Ptn. 1122 (1960) referred to in A.I.R. 1963 Guj. 175; Ratilal v Tribhowan Das Civil Rev. Ptn. 577 of 1961 ref. to in A.I.R. 1968 S.C. 372; Madansinghji v Gujerat A.I.R. 1963 Gujerat 175; State v Ramprakasa A.I.R. 1964 Gujerat 223 at pr. 6-24.

40. A.I.R. 1965 S.C. 1767

justice, but reproved the fact that he had chosen to re-examine an issue on which the Division Benches of the High Court had laid down a clear and definitive ruling. He thought that the judge ought to have laid the relevant papers before the Chief Justice, to enable the latter to constitute a larger Bench to examine the question. He observed :

> "that is the proper and traditional way to deal with such matters and is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single judge departed from this traditional way and chose to examine the question himself."[41]

Dhavan J. in a letter to me thought the Supreme Court had not in fact solved the basic problem that he had put before them :

> "My concern in that case was to ensure that the litigant who had already spent a long time in trying to get his case heard by the High Court, should not go through the time consuming process of having his case decided by a Full Bench and thereafter by the Supreme Court. I was dealing with a statute which was enacted as a temporary measure to control rents in 1947, and it appeared incongruous that a measure to speed up the process of allotment of houses should get clogged up in the judicial process of a Full Bench. The Supreme Court had begun to change their view of natural justice and I thought that since all the towns in the State of U.P. were going to be affected by my decision the sooner it got confirmed by the Supreme Court the better. It is sad that the Supreme Court gave me lectures on judicial decorum, but did not lay down any guidelines on when a siggle judge can break this 'decorum' and give leave to appeal to them without any further delay. I realise that such cases must be few. But that such cases should be inevitable, is something that the Court appears to have overlooked." [42]

This indeed is a matter that the Supreme Court has overlooked. The Constitution forbids a single judge to grant leave to appeal in only certain matters[43] but the Supreme Court has however made some policy statements on this in a recent decision[44] despite their earlier decision that such appeals would be discouraged.[45]

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41. Ibid at pr. 18 p. 1773.

42. Letter dated July 2, 1971.

43. Article 133(3)

44. See Union v Jyoti Prakash A.I.R. 1971 S.C. 1093 at pr. 17 p.1100,

45. R.D.Agarwala v Union A.I.R. 1971 S.C. 299 and comment by Seervai (1971) 73 Bom.L.R. Jnl. 54

V. Raju J. discussed his position at length in an unreported case and again in State v Ram Prakash[46] where he emphasised the terms of his oath to uphold the "true" law and, further, the fact that accident played so important a part in particular decisions being decided in the way they were, that he refused to be bound by them.[47] In Tribhovandas v State[48] Shah J. dealt with Raju J.'s arguments. Shah J.'s main argument was :

> "Judicial decorum, propriety and discipline required that he should not ignore ... (Full Bench) decision of his Court. Our system of the administration of justice aims at certainty in the law and that can be achieved only if judges do not ignore decisions of Courts of co-ordinate authority." 49

He rejected Raju J.'s arguments that a Full Bench had no status in law,[50] stressed that the terms of the oath merely imposed the duty to be impartial, and added :

> " ... but there is nothing in the oath which warrants a judge in ignoring the rule relating to the binding nature of precedents." 51

Hegde J. repeated similar observations about another judgement of Raju J. in Dhanki Mahajan v Rana Chandubhai[52]

It will be seen that the Supreme Court has been very strict in ensuring that the interhierarchical structure of precedent is retained. Their approach accords with the view of the House of Lords in Cassell Ltd. v Broome (1972)[53] that the hierarchy of precedent must be retained and that judges who want a particular provision of law changed must go through

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46. State v Ramprakash A.I.R. 1964 Guj. 223 at pr 6 pp. 225 ff.

47. Ibid at pr. 7.

48. A.I.R. 1968 S.C. 372.

49. At pr. 11 p. 377 referring to Sri Bhagwan v Ramchand A.I.R. 1965 S.C. 1767.

50. At pr. 10.

51. At pr. 13 p. 377

52. A.I.R. 1969 S.C. 69 at pr. 3 p. 71.

53. The Times, Feb. 24, 1972 at p. 27.

the existing channels. They are at liberty to record their protest, but not pursue their views at the expense of upsetting precedent.

ii. The binding effect of an "obiter dictum" of the Supreme Court.

Article 141 of the Constitution lays down: "The law ... declared ... by the Supreme Court shall be binding on all Courts in India." By and large all High Courts agree that they are bound by even an obiter dictum of the Supreme Court.[54] The leading judgement on this is that of

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54. Allahabad High Court: Union v Firm Ram Gopal A.I.R. 1960 All. 672; Babu Nandan v Sumita A.I.R. 1961 All. 287 at 288; C.I.T. v Manmal (1961) 42 I.T.R. 203 (All.); Sadhu Singh v State A.I.R. 1962 All. 193 at 196; Khem Karan v U.P. A.I.R. 1966 All 255; N.I.A.Co. v Janak Dulari A.I.R. 1966 All. 266 at pr. 8 p. 268; Rameshwar Prashad v I.T.Commr. A.I.R. 1968 All. 88 at pr. 5 (obiter persuasive); Ram Manohar Lohia v State A.I.R. 1968 All. 100 at pr. 13 p. 106; Chobey v Sonu A.I.R. 1969 All 305 at pr. 8; H.C.Mishra & Co. v I.T.Commr. A.I.R. 1969 All. 566; Swami Prashad v Harovind Sahai A.I.R. 1970 All. 251 (but it left the question open). Andhra Pradesh: K.C.Venkata Chalamayya v Madras A.I.R. 1958 A.P. 173 at pr. 16; Desu Rayudi v A.P.S.C. A.I.R. 1967 A.P. 353 at pr. 32. Assam: Nuruddin v Assam A.I.R. 1956 Assam 48. Bombay; K.P.Doctor v Bombay A.I.R. 1955 Bom.220 at 224; Mohandas v A.N.Sattahathan A.I.R. 1955 Bom. 113 at 118; Narayanlal v Maneck Phiroze A.I.R. 1959 Bom. 320 at 327; B.T.Bhosle v M.S.Amey A.I.R. 1961 Bom 29 at 41; Anant v Baburao A.I.R. 1967 Bom. 109 at 115; Vishnu v Mahahrashtra W & G Co. A.I.R. 1967 Bom. 434 at 437; State v Vali Mohammad A.I.R. 1969 Bom. 294; Hiranandini B.B. & D Mfg. Co. A.I.R. 1969 Bom. 373 at 378; Calcutta: Obiter distinguished in S.Muchand v Collector A.I.R. 1968 Cal.174 at 186; but see Gouri Gupta v Tarani Gupta A.I.R. 1969 Cal. at 309; State v D.Surya Rao A.I.R. 1969 Cal. 594; Sailendra Nath Purnedu A.I.R. 1970 Cal. 169; A.K.Roy v K.C.Sen Gupta A.I.R. 1971 Cal. 252 at 257. Gujerat: Lalu Jela v Gujerat A.I.R. 1962 Guj. 250 at 255; Jaswantbhai v Nichhabhai A.I.R. 1964 Guj. 283 at 287; P.V.Patel v State A.I.R. 1966 Guj. 102 at 105 (but not directly on obiter); Prithvi Cotton Mills v Broach Mun. A.I.R. 1968 Guj. 124 at 142; Chotalal v Vivekanand Mills A.I.R. 1970 Guj. 277 at 284; Himachal Pradesh: Kalyan Singh v Baldev Singh A.I.R. 1961 H.P. 2 at 7; Union v Wazir Chand A.I.R. 1962 H.P. 24 at 26. Note the comments of Saxena (cited supra f.n.2) at 1331. Orissa: S.M.T.Haramani v Dinabandhu A.I.R. 1954 Orr. 54; F.C.Visalamma v Jagannadha Rao A.I.R. 1955 Or. 160 at 162; Nain v State A.I.R. 1965 Or. 7 at 9. Madhya Pradesh: Suraj Mal v M.P. A.I.R. 1958 M.P. 103 at 111; Re Lachman Nand A.I.R. 1966 M.P. 261 at 269. Patna: Bihar v B.L.Agarwala A.I.R. 1966 Patna 410 at 418; S.V.P.Cement Co. v Union A.I.R. 1967 Patna 315 at 317. Rajasthan: Brij Sunder v Election Tribunal A.I.R. 1957 Rajasthan 189 at 197; Jeevraj v Lalchand A.I.R. 1969 Rajasthan 192 at 209 (the question asked in this judgement is:"Did the Supreme Court intend to lay down the law?"); Nag Raji v R.K.Birla A.I.R. 1969 Rajasthan 245 at 247. Mysore: D.G.Vishwanath v Mysore A.I.R. 1964 Mys.132 at 138.(see also the opinion of Manipur in (1962) II Crim.L.J.147. Madras: Veerappa Chettiar v I.T.Commr. A.I.R. 1959 Mad.56 at 61 (obiter entitled to the highest respect); Jammu and Kashmir: Sheikh Abdul v Jagat Ram A.I.R. 1969 J.K.16; Karim Bux v State A.I.R. 1969 J.K.77 at 86.

Dhavan J. in Union v Firm Ram Gopal[55] where he observed:

> "(I)t has been overlooked ... (in the various authorities cited before me) that the doctrine of supremacy of any declaration of law by the Supreme Court has been made a part of the Constitutional law of the Republic. It therefore rests on a much loftier pedestal than judicial conventions under which every inferior Court is bound to follow previous decisions of a superior Court ... Article 141 had the effect in addition to investing the decision of the Supreme Court with a binding force of creating a constitutional organ whose declaration of law pronounced ex cathedra shall be binding on all courts in India." (emphasis mine)

The problem however is : What part of the judgements of the Supreme Court are made ex cathedra ? Thus even in the Allahabad High Court, judges have observed that obiter dicta of the Supreme Court are only of persuasive value.[56] Again, Satish Chandra J. of the same High Court has opined that he is not bound by a ruling where the argument in the Supreme Court has proceeded on a concession.[57] There are several decisions of the High Courts which distinguish a Supreme Court ruling on the ground that it was merely a casual observation, and that the Court was bound by an obiter dictum but not by a casual observation.[58] Chandrachud J. of the Bombay High Court has further insisted that an obiter dictum is binding only if it is a considered opinion.[59] This contrasts with the opinion of the Calcutta High Court which has ruled that the rulings of the Supreme Court are binding even if the point was not argued before the Supreme

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55. A.I.R. 1960 All 672 at 680.

56. Rameshwar Prashad v I.T.Commr. A.I.R. 1968 All 88 at 89.

57. Nathu v Sub.Divl.Officer W.Ptn. No: 2399 of 1968 referred to in A.I.R. 1970 Allahabad 251 at 255-6.

58. Mohandas v Sattanathan A.I.R. 1955 Bom. 113 at 118; Anant v Baburao A.I.R. 1967 Bom. 109 at 115; State v Vali Mohd A.I.R. 1969 Bom. 294 at 295; Hiranandini v B B & D Mfg. Co. A.I.R. 1969 Bom. 373 at 378; Nag Raj v R.K.Birla A.I.R. 1969 Rajasthan 245 at 247.

59. Vishnu v Maharashtra W & G Co. A.I.R. 1967 Bom. 434 at 437; See also Chagla C.J. in K.P.Doctor v Bombay A.I.R. 1955 Bom. 220 at 224.

Court[60] or if the ruling proceeded on an argument different from that before them.[61] The Gujerat High Court has gone one step further still. In Chotalal v Vivekananda Mills[62] Mehta J. observed :

> "(T)he point is concluded by the decision of the Supreme Court, which is completely binding on us and it is not open to this Court to distinguish this decision on facts. It is only in case of the decision of the concurrent Court that the doctrine(s) of obiter, per incuriam or distinguishable on fact, could be applied."

The Orissa High Court has taken the view that even an obiter of the Federal Court is binding unless they make it clear that their view was intended to be a tentative one.[63] The Madhya Pradesh High Court have also made this distinction between an obiter dictum and a tentative opinion.[64]

The Supreme Court cannot really pass a definitive opinion on this because any statement that they make will in fact be an obiter, in as much as they will be commenting on a problem that deals with a situation that they will never be involved in themselves, because of their rulings in the Bengal Immunity Case[65] that Article 141 does not apply to them. The Court has however taken the view that their own obiter dicta are entitled to the highest respect.[66] But more recently Shah J. observed in Madhav Rao Scindhia v Union[67] :

> "It is difficult to regard a word, clause or a sentence occurring in a judgement of this Court, divorced from its context

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60. Ajaib Singh v C.W.T. A.I.R. 1969 Cal. 249 at 252-3.

61. Sailendranath v Punedu A.I.R. 1971 Cal. 169 at pr. 11 p.170.

62. A.I.R. 1970 Guj. 277 at 284.

63. F.C.Visalamma v Jaganadha A.I.R. 1955 Or. 160 at 162.

64. Re Lachman Nandu A.I.R. 1966 M.P. 261 at 269.

65. A.I.R. 1955 S.C. 661.

66. I.T.Commr. v Vazir Sultan & Sons A.I.R. 1959 S.C. 814 at 821.

67. A.I.R. 1971 S.C. 530 at pr. 13 p. 578 col. 2.

> as containing a full exposition of the law on a question, when the question did not even fall to be answered in that case ..."

In G. L. Gupta v D. N. Mehta[68] the Court ruled that when the attention of the Court was not drawn to a particular statute, it can review its own decision. The question remains : do these rules apply to the High Courts and can they also distinguish the rulings of the Supreme Court in this way ? The law on Article 141 is in a state of confusion. The Supreme Court cannot solve this problem. It is up to the High Courts to achieve some kind of uniformity. The Supreme Court has however promised that it would not give "speculative opinions on hypothetical questions." 69

d. Ways of following and distinguishing a case.

It appears that although Courts in India adhere to a very strict theory of precedent, in actual fact they have discovered a large number of ways in which they can follow or not follow a precedent. K. Llewellyn, analysing Appelate Court procedure in the United States of America, noted that in America there were at least 64 different reasons given for following or avoiding preceding authority.[70] Indian Courts have produced an equally interesting variety. At least 12 considerations that must be borne in mind can be found in Gajendragadkar J.'s judgement in Keshava Mills v I.T.Commr. :[71] The first three are the usual three reasons which were declared in the classic Court of Appeal case of Young v Bristol Aeroplane Co.[72] Gajendragadkar recounts them by asking :

> "What is the nature of the infirmity of error on which a plea for the review of the earlier decision is based ? (In) ... the earlier decision did some patent aspects of the question remain unnoticed ? ... was the attention of the Court withdrawn (from)

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68. A.I.R. 1971 N.S.C. 174.

69. S.K.Das J. in Central Bank of India v Workmen A.I.R. 1960 S.C. at 28.

70. The Common Law Tradition (1960) 75-92.

71. A.I.R. 1965 S.C. 1636.

72. (1944) K.B. 718 and comment Cross: Precedent in English law (1968) 108-110.

> any relevant or material statement or provision, or was any previous decision of this Court bearing on the point not noticed ?" 73

To this his lordship added the following considerations :

> "Is the Court ... fairly unanimous that there is ... an error in the earlier view ? What would be the impact of the decision on the general administration of the law or the public good ? Has the earlier decision been followed on subsequent occasions either by this Court ... or the High Courts(s) and would the refusal (to follow) the earlier decision lead to public inconvenience, hardship or mischief ? ... These considerations become still more significant when the earlier decision happens to be a unanimous one of a Bench of the learned judges of this Court." 74

Courts in India have added further considerations that must be borne in mind; the Common Law view of the matter must not be upset;[75] has the decision stood the test of time ?[76] will the decision lead to uncertainty in the area of property law ?[77] is the point in law covered by a Full Bench decision of the High Court or of the Supreme Court ?[78] will commercial

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73. A.I.R. 1965 S.C. 1636 at pr.23 p.1644.

74. Ibid

75. Director of Rationing and Distribution, Calcutta v Corpn of Calcutta A.I.R. 1960 S.C. 1355 at pr. 7. But note the dissent of Wanchoo J. and the fact that this case was overruled in W.B. v Corpn. of Calcutta A.I.R. 1967 S.C. 997.

76. See Nirsin v Sudhir Kumar A.I.R. 1969 S.C. 864 at pr. 4, p. 866; Raman Nadar v S.Raslamma A.I.R. 1970 S.C. 1759 at pr. 10. p.1763; Smt Indi Devi v Board of Revenue A.I.R. 1955 N.U.C. 2294 (All); Sakarchand v Narayan A.I.R. 1951 Bom.10 at pr. 10; C & J Bank v M.S.Alikhan A.I.R. 1956 Hyd. 65; Thayamma v Giriyamma A.I.R. 1960 Mys. 176 at pr. 4 p.177 (per Hegde J.) Venkamma v Lamisonappa A.I.R. 1951 Bom 57 (per Bhagwati J.) at pr. 22 p. 66; S.K.Das J. in Bhagwat Sharma v Baijnath Sharma A.I.R. 1954 Pat. 408 at pr. 18 p.414; Sakarchand v Narayan A.I.R. 1951 Bom. 10 at pr. 10; Smt Indi Devi v Board of Revenue A.I.R. 1955 N.U.C. 2224 (D.B.) C & J Bank v M.S.Ali Khan A.I.R. 1956 Hyd 65 at pr. 12 p. 70; Benoy Krishna v Ashotosh D.E. A.I.R. 1954 Col. 389 at pr. 11 p. 322; Anjaneyulu v Rang Charyuly A.I.R. 1958 A.P. 705 at pr. 6706; Smt Ravan v Smt Gouri Bai A.I.R. 1959 MPP. 301 at pr. 14 p. 304; Ram Bhatra v Kondama A.I.R. 1963 Mys. 332 at pr. 11 p. 334; Adinaranappa v Mallama A.I.R. 1950 Mys. 13 at pr. 13 p. 17; Ambika Prashad v Thakur Prashad A.I.R. 1958 Pat. 399 at pr. 5 p. 401; p.230, p.405.

77. Venkamma v Laxmisonappa A.I.R. 1951 Bom. 57 (per Bhagwati J.) at pr. 22 p. 66.

78. See section on obiter dictum supra and Mohammad Raza v U.P. A.I.R. 1953 S.C. 92 at pr. 11 p. 94.

transactions be affected by the decision ?[79] the existing procedure to be followed in Courts should not be changed;[80] will the decision affect the hierarchy of precedent ?[81] do the facts of the instant case demand that earlier cases be followed ?[82]

All these considerations themselves involve further considerations, depending on the facts of the instant case and the emphasis that a particular judge may put on the various factors that must be borne in mind. As Judge Frank observed :

> "Courts in deciding cases are engaged in a sort of retail, not a wholesale job" 83

Detailed analysis of the effect of these considerations is beyond the scope of this thesis, but these considerations will be borne in mind in the analysis of particular problems later.

e. The application of an earlier ruling.

Before either the reasoning (ratio decidendi) or a casual statement (obiter dictum) of one decision can apply to another, some similarity between the two decisions must be proved. The earlier case must be on the same point of law, the same or a similar section of a statute, or a similar section in a statute in pari materia and with substantially the same facts. Thus in Bombay Union of Journalists v Bombay[84] the Court was not willing to apply the observations made on S.25(7)(b) of the Industrial Disputes Act 1947 in Bombay v Hospital

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79. Rama Bhatia v Kondandarama A.I.R. 1963 Mys. 332 (per Hegde J.); Ambika Prashad v Thakur Prashad A.I.R. 1958 S.C. 399 at pr. 30 p. 405; Admaranappa v Mallappa A.I.R. 1950 Mys. 13 at pr. 13 p. 17.

80. Benoy Krishna v Ashutosh De A.I.R. 1954 Cal. 382 (per Chakravarta J.) at pr. 11, p. 392; C & I Bank v M.S.Ali Khan A.I.R. 1956 Hyd 65.

81. See the comments earlier on the obiter dictum and Article 141 (supra).

82. Note the case of Kameshwar v Bihar A.I.R. 1952 S.C. 252 and contrast it with Gajapati v Orissa A.I.R. 1953 S.C. 375 on the doctrine of colourable legislation. On this see comments infra Chapter II Section 3; Chapt.III.

83. Courts on Trial (1969 Atheneum Paperback Edn) p.11.

84. A.I.R. 1965 S.C. 1617 at pr. 9 pp 1622-3.

Mazdoor Sabha[85] to S.25(7)(c) of the same statute, even though the sub-sections are similar. But in State v Bhanji Munji[86] Bose J. applied the principle of Gopalan v Madras[87] on Article 21, to Article 31 of the Constitution. In Kochunni v Madras[88] Subha Rao J. applied a different principle to Article 31 and argued that it should apply to Article 21, even though he admitted that they were not in pari materia.[89] The attitude of the Courts in India on what is pari materia is not always consistent[90]. Thus in Assam v P. Barua[91] Grover J. felt that Section 22 of the Income Tax Act 1922 was in pari material to Section 19(3) of the same statute. This contrasts with the view of Chagla C.J. in Bombay v R.E.Society[92] that the pari materia rule should not apply to fiscal statutes.

Further it should be noted that it has been argued in certain cases that even if the subsequent case is on the same section of a statute, certain orders passed in the case cannot be treated as precedent. Thus in Satyanarayana Rao v Sree Ramun[93] Sanjeeva Row J. refused to accept that an order passed in Re Ganpati Pillai[94] restricted the revisional power of the High Court under Section 25 of the Provisional Small Cause Courts Act 1887. He felt that such orders were mere ipse dixits. In

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85. A.I.R. 1960 S.C. 670.

86. A.I.R. 1955 S.C. 41 at pr. 6 p. 44.

87. A.I.R. 1950 S.C. 27.

88. A.I.R. 1960 S.C. 1080

87 Ibid at pr. 25 p. 1093 col. 1.

90. See G.P.Singh: Statutory Interpretation in India (1966) 142-144.

91. A.I.R. 1969 S.C. 831 at pr. 4 p. 837.

92. A.I.R. 1956 Bom. 673 at pr. 4 p. 674.

93. A.I.R. 1961 A.P. 461 at p. 464.

94. (1912) M.W.N. 181.

Dudh Nath v Sat Narain[95] Jagdish Sahai J. felt that an order that a case is fit for appeal is not a precedent. In Cantonment Board v M/S L.D.Hari Ram[96] Dua J. observed that in cases on the discretionary power under Article 227 of the Constitution earlier precedent was irrelevant.

No two cases have the same facts. The Courts are not even willing to apply the same rules of construction to facts. In Nita Ram v Jiwan Lal[97] Hidayatullah J. stressed in a tenancy case that facts vary from case to case and than an earlier set of facts cannot be used to interpret later ones. In a case[98] on Section 302 of the Indian Penal Code 1860 (murder) Sinha J. pointed out that a previous Court's assessment of the facts is not relevant as precedent. In Jwala Mohan v State[99] Desai C.J. protested against earlier judges imposing their assessment of the evidence in a case to similar evidence in later cases. Again Courts have held that documents,[100] deeds,[101] leases,[102] and wills[103] and

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95. A.I.R. 1966 All. 315.

96. A.I.R. 1962 Punj. 490 at 491.

97.0 A.I.R. 1963 S.C. 499

98. Prakash Chandra v U.P. A.I.R. 1960 S.C. 195. See also Gurcharan Singh v Punjab A.I.R. 1956 S.C. 460 at pr. 9 p. 462-3 on the use of an earlier case by way of illustration; Sinha J. in Kalidas v Univ. of Calcutta A.I.R. 1951 Calcutta 129 at pr.10 p.13.

99. A.I.R. 1963 All 161 at 163-5. See also U.P. v Randhir Sri Chand A.I.R. 1959 All 727 at pr.17-18 p.730; Manik Chand v Bishambar Nath A.I.R. 1955 N.U.C. 3304 (All.); Mohd Ishaq v Mohd. Bashir A.I.R. 1961 Pun. 8 at pr.11 p.11

100. Madho Das v Mukand Ram A.I.R. 1955 S.C. 481; but see Munuswamy v Muniramiah A.I.R. 1965 A.P. 177.

101. M.P.Davis v Ag.I.T.Commr. A.I.R. 1959 S.C. 719 at pr.4 pp.721-2; but contrast Vodayar Vijayar Bank A.I.R. 1959 Mad. 318 at pr.5.

102. Mullick Chand v Surendra A.I.R. 1957 Cal. 217 at pr.26 p.220.

103. Ram Chand v Hilda Brito A.I.R. 1964 S.C. 1325 at pr.15 p.1329.

contracts[104] are to be construed without reference to earlier precedent, even though the Courts have accepted certain general rules of interpretation.

Once we have decided that an earlier case is relevant to a later case, we ask ourselves what the ratio decidendi of the earlier case was. It should be noted that determining the "ratio" is a second step in applying an earlier ruling. A great deal of controversy has centred around this question.[105] For our purposes the ratio may be defined as the reasons for arriving at a particular decision as indicated by the facts of the case. Goodhart's theory[106] that a ratio must be read as indicated by the "material facts" of the case does not solve the problem as regards which judge - the later or the earlier - should determine the ratio and select the facts. In fact Goodhart himself admits that often further decisions have to "(plot) the points on (the) graph"[107] Opinion can vary as regards determining both the reasons as well as the facts of the case, as has been shown by an analysis of the famous case of Donoghue v Stevenson.[108] It will be seen later that varying interpretations of the ratio in a particular case have emerged in different judgements by different judges (and even often the same judge) in different cases. It must not be thought that the ratio is in fact indeterminable.

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104. Gulab Chand v Kudi Lal A.I.R. 1959 M.P. 151 (F.B.) at pr.18 p.161-2.

105. See for example the controversy on Goodhart's theory of the ratio decidendi: J.L.Montrose (1957) 20 M.L.R. 587; Goodhart (1958) 21 M.L.R. 155; Simpson: (1959) 22 M.L.R. 45; Stone: (1959) 22 M.L.R. 38.

106. See Determining the ratio etc. (1930) 40 Yale L.Jnl. 161-183. I have relied on the reprint in Essays in Jurisprudence 1-26. See also article cited f.n.105 supra).

107. Goodhart (1959) 22 M.L.R. 117 at 124 citing from Paton: Jurisprudence (IId) 161.

108. (1932) A.C. 562. And note the analysis of Julius Stone in Legal System and Lawyers' Reasonings (1964) 269-274.

See also p.235 ff infra.

Certainly in a large number of cases the ratio is clear, but at the same time it may or may not be capable of a wider application. This will be demonstrated in the area of Constitutional law later.

A ratio is contrasted with an obiter dictum, which consists of statements which are not necessary to the reasoning of a case but nevertheless have persuasive value. We have seen above that in India judges have further distinguished an obiter dictum from "a casual observation", "an argument proceeding on a concession" and "a tentative opinion", and contended that the last three are not even of persuasive value.[109]

Thus, Courts in India are able to invent a large number of rules for distinguishing and applying earlier case law. The two basic questions asked are : (1) Are the two decisions in any way similar ? (2) Is the particular argument a part of the reasoning of the case ? But surrounding these two basic rules are a lot of fine but fundamental distinctions. This is illustrated later.

f. The doctrine of prospective overruling.

In Golak Nath v Punjab the Supreme Court held that Parliament cannot amend Part III of the Constitution. If this judgement were to be given retrospective effect (as all judgements of the Court must be) because of the Blackstonian fiction that judges merely declare the law, the First, Fourth and Seventeenth Amendments and with them a large number of Statutes that they were enacted to protect, would become ultra vires the Constitution. The Court therefore ruled that their

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109. For a good account of the language used in this area see J.L.Montrose: Language of and a notation for the Doctrine of Precedent (1952-3) 2 Univ. of Western Australia Annual Law Review 301, 504.

judgement would only have prospective effect.[110] The Court emphasised that this technique of prospective overruling would be exercised only by the Supreme Court and limited to constitutional matters. This doctrine was evolved in America where it was used in the famous case of Linkletter v Walker (1965)[111] In that case the Court was anxious to ensure that already completed cases should not be reopened because of the ruling in Mapp v Ohio,[112] which altered fundamentally the rules about self-incrimination in State Criminal trials. As an idea it is extremely just as it recognises the simple truth that judges do change their minds and make "laws". More recently the Parliamentary Commissioner for Administration in England has used similar principles to work out an equitable settlement, where a 1966 decision of the Courts had altered the rules relating to disablement benefit.[113]

We are here not concerned with the wider implications of this

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110. A.I.R. 1967 S.C. 1643 Subha Rao J. at 1669; Wanchoo J. at 1690-1; Bachawat J. 1728. The last two (Wanchoo J. for Bhargava and Mitter JJ.) were against the use of prospective overruling. Subha Rao J. delivered his judgement for Shah, Sikri, Shelat and Vaidialingam JJ as well.

111. 381 U.S. 618.

112. 367 U.S. 643. See further B.H.Levy: Realistic jurisprudence and prospective overruling (1966) 100 Univ. of Penn L. Reg. 1.

113. See the Second Report of the Parliamentary Commissioner for Administration (1970-71) dated Aug 3, 1971. See the recommendation at pr.21 p.9.

aspect of Golak Nath's case which can be discussed elsewhere,[114] but we will concentrate on two main points.

Firstly, the Court has in fact used the doctrine of prospective overruling in several cases, even though it has not admitted that it has done so, as in Venkataramma v Madras[115] where the Courts had declared the selection process of candidates for certain civil posts ultra vires the Constitution. But Das J. stressed that since it was not possible to declare the selection of all the candidates void, a place would be found for the petitioner without reference to Communal rotation.[116] Again in a similar situation, in P.Rajendram v Madras[117] Wanchoo J. agreed to let current selections stand[118] even though they were ultra vires Article 14 of the Constitution. In B. N. Tewari v Union[119] the same judge made an extremely intricate ex poste facto calculation to reduce the number of vacancies from forty-eight to forty-three to hold that the petitioner having no right to the post could not upset existing appointments. Again in Jagdev Singh v J.K. [120] in connection with a preventive detention

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114. See infra pp 578 ff

115. A.I.R. 1951 S.C. 229.

116. Ibid pr.4-5 p.229.

117. A.I.R. 1968 S.C. 1012.

118. Ibid pr. 16. He admitted that the basis for selection was ultra vires Article 14 at pr.13 p.1017.

119. A.I.R. 1965 S.C. 1430 at pr.7.

120. A.I.R. 1968 S.C. 327.

matter, the Court was faced with a situation where certain rules had been changed because the Supreme Court overruled its own earlier decision on a particular point.[121] Wanchoo J. gave the authorities an opportunity to correct their error and justified his ruling on the ground that they could not possibly have anticipated the Court's changing its mind.[122] Ironically Wanchoo J. voted against adopting the doctrine of prospective overruling in Golak Nath's case.[123]

Secondly, the actual doctrine of prospective overruling has been given a curious twist in India. It should logically have followed that the Amendments declared invalid by the Supreme Court in Golak Nath's case should become invalid after February 27, 1967 - the date of the Golak Nath decision. But in a recent[124] case[124] Shah J. on behalf of the Supreme Court has ruled that the Amendments are not invalid prospectively either, but that the power to amend the Part III was declared invalid and that the Court would declare invalid any future attempts to amend Part III. Thus it appears that prospective overruling in India has come to mean a warning by the Supreme Court that future excesses of power will be declared invalid by the Supreme Court, and that existing statutes though void shall be presumed to be valid both retrospectively and prospectively. In Golak Nath's case, apart from Hidayatullah J., the majority did not even examine the provisions of the statute to determine which parts of them were invalid and seemed content to deliver a warning to the legislature on future exercises of power. It also appears that prospective

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121. The decision in Sadhu Singh v Delhi Administration A.I.R. 1966 S.C. 91 was overruled in P.L.Lakhanpal v Union A.I.R. 1967 S.C.1567

122. See f.n.120 at pr.8 p.330

123. See f.n.110 supra.

124. (1970) 1 S.C.W.R. 100. See also Narayan Nair v State A.I.R. 1971 Kerala 98 at pr.6 but note the dissent of Mathew J. at 125-6.

overruling in the sense in which it is understood elsewhere is in fact a normal feature of the techniques used by the Supreme Court.

This approach of the Court may well have been dictated by the fact that invalidating the Amendments even prospectively would have led to disastrous results. But once again a broad principle seems to have emerged from a problem case.

g. Conclusion

The Supreme Courts and High Courts have thus on the surface adhered very closely to precedent. The merit of following earlier decisions and not disturbing the hierarchy of precedent is recognised; but at the same time the Courts have devised ways and means of distinguishing earlier case law. The Supreme Court had made an independent contribution to the doctrine of prospective overruling and Indian Courts generally have made a very varied and rich contribution to the Common Law rules on precedent.

2. The Supreme Court and Statutory Interpretation.

a. The Supreme Court[1] and the Rule of Literal Interpretation.[2]

To some extent the Supreme Court displays the dilemma that any Court faces if it follows the rule of literal interpretation as well as taking advantage of some of the Common Law escape routes that have made the rule bearable. More recently, the English and Scottish Law Commissions have proposed an easier way out and suggested that the rule be changed drastically, if not abandoned altogether.[3] The Indian Courts are, however, bound by the rule and have made full use of the escape routes that the Common Law specifically admits.

These escape routes are of three kinds. The first is a recourse to the rule in Heydon's case (1584)[4] which allows the Court to examine the statute in its "legal historical perspective". The second relates to a situation where the Court uses the argument that any other interpretation would produce an absurd result.[5] The third escape route is the use of well known Common Law presumptions: it will be presumed that a statute does not exclude the jurisdiction of the Courts, bind the Crown, delegate excessive power or impose unjustified fiscal or penal burdens.

These three techniques are responsible for the existence of a system of interpretation which uses the rule of literal construction

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1. The most comprehensive account of the Supreme Court and statutory interpretation is G.P.Singh: Principles of statutory interpretation (Allahabad) 1966. This section will use in the main post-1966 references so as not to duplicate his work.

2. Rule declared by House of Lords in Sussex Peerage Claim (1844) 11 C.I. & F. 85 at 143; Saloman v A.Saloman & Co. Ltd.(1897) A.C. 22 at 38.

3. Law Commission Report (1969 No. 21) pr.80; see also Scottish Law Commission Report (1969 No. 11).

4. (1584) 3 [Coke] Reports 7a = 76 E.R. 637.

5. See for example Shyam Kishore Devi v Patna Mun. Corpn A.I.R. 1966 S.C. 1678 at pr.8 1682.

as a modus operandi.[6] The Indian Court has followed this system, making occasional changes, which are by no means insignificant.

b. The first escape route :Heydon's case[7]

The Supreme Court has always accepted the fiction that the object of statutory interpretation is to ascertain the intention of the legislature. It has recently observed :

> "It is a trite saying that the object of interpreting a statute is to ascertain the intention of the legislature" 8

The Court also accepts the corollary to this :

> "(T)he first and primary rule of construction is that the intention of the legislature must be found in the words of the legislature itself." 9

Courts do not want to go into the "real" intent of Parliament, although it has been recently suggested that they do so.[10] The Supreme Court has made it clear that they will not fill gaps in a legislative enactment,[11] gather the intention of the legislature from what they failed to say,[12]

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6. To the extent to which this describes the actual law, this statement is an exaggeration. But it is a fair description of the judicial process.

7. (1584) 3 Coke Rep. 7a.

8. Per Sarkar J. in S.Asia Industries v Sarup Singh A.I.R. 1966 S.C. 346 at pr.7, 348.

9. Per Gajendragadkar J. Kanai Lal v Paramnidhi A.I.R. 1957 S.C. 907 at 910 col. 2.

10. Per Denning L.J. in Mayor & St. Mellons R.D.C. v Newport Corpn (1950) 2 All E.R. 1226; on appeal note the comments of Lord Simonds (1952) A.C. 189 at 191. But see also the comments of the Law Commission (infra f.n.3) at p.32-37, where a different approach is suggested.

11. Per Ramaswami J. in N.S.S.& G.R.W. v I.T.Commr. A.I.R. 1969 S.C. 1062 at pr.9, 1068.

12. Per Hegde J. in Amalgamated Electricity v Aymer Mun. A.I.R. 1969 S.C. 227 at pr.14, 234.

or add words; but follow the natural,[13] literal,[14] and grammatical meaning.[15] But in the last two cases cited the Court was decidedly uncomfortable about taking the rule to its logical conclusion. Thus Hegde J. was certainly looking for a way out in Bhagwan Das v Paras Nath[16] and made a plea that the statute be redrafted.[17] Similarly Shelat J. in S. S. Rly v Workers' Union[18] proceeded in the very next paragraph to examine the legislative history of the enactment before him.

In order to deal with the pressure on the Court to know more about a statute before them, the Court uses the rule in Heydon's case[19] which permits the Court to consider the following factors :

"(1) What was the Common Law remedy before the making of the Act.

(2) What was the mischief and (the)defect that the Common Law did not provide (for)

(3) What remedy tha Parliament hath resolved and appointed to cure the disease of the Commonwealth;

(4) The true reason for the remedy."

This expands the Court's area of concern and prevents them from following what has been called "the path of least resistance";[20]

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13. Per Shelat J. in S.S.Rly Co. v Workers' Union A.I.R. 1969 S.C. 513 at pr.6 p.518 citing from Saloman v A.Saloman & Co. (1897) A.C. 22.

14. Per Hegde J. in Bhagwan Das v Paras Nath A.I.R. 1970 S.C. 971 at pr.7 p.967 (on a U.P. rent control matter). For background see Sri Bhagwan V Ramchand A.I.R. 1965 S.C. 1767.

15. Per Sarkar J. in M.P. v Vishnu Prashad A.I.R. 1966 S.C. 1593 at pr.3 p.1595 (an important case on the law of property and referred to later).

16. A.I.R. 1970 S.C. 971 at pr.7 p.976-7.

17. Ibid at pr.7 p.975.

18. A.I.R. 1969 S.C. 513 at pr.7 p.518-19.

19. (1584) 3 Coke Reports 7a.

20. The phrase is C.K.Allen's : Law in the making (1964; 7d) 507.

Indian Courts have accepted this rule in a large number of cases.[21] In certain other cases the Court does not cite Heydon's case but accepts the rule citing Maxwell's Interpretation of Statues.[22] The Supreme Court have, however, stretched their inquiry beyond the narrow confines of Heydon's case. They have allowed recourse to the Statements of Objects and Reasons that accompany a statute, though admitting that all they were really permitted to do was ascertain the object of the Statute.[23] Reports of Commissions have also been referred to.[24] In a remarkable

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21. The leading case is Bengal Immunity Co. v Bihar A.I.R. 1955 S.C. 661 at pr.22 p.674; see also Kanai Lal v Paramnidhi A.I.R. 1957 S.C. 832 at pr.14 p.835(citing the first case which is also cited by S.K.Das J at pr.33 p.841); R.M.D.C. v Union A.I.R. 1952 S.C. 628 at pr.7, 631; I.T. Commr. v Sodra Devi A.I.R. 1957 S.C. 832 at 835; Shivanarayan v Madras A.I.R. 1967 S.C. 986 at pr.7 p.989; Mahijibhai v Manibhai A.I.R. 1965 S.C. 1477 at pr.20 p.1482 quoting Heydon's rule from Maxwell's Interpretation of Statutes (118) 18.

22. Shivanarayan v Madras A.I.R. 1967 S.C. 986 at pr.7, 989; U.P. v C.Tobit A.I.R. 1961 S.C. 414 at pr.3 p.416; Kanwar Singh v Delhi Administration A.I.R. 1965 S.C. 871 at pr.10 p.874.

23. It was first thought that these were not admissable for purposes of interpretation. See Shastri C.J. in Ashwini Kumar v Arabinda Bose A.I.R. 1952 S.C. 369 at 378; S.K.Das J.: Central Bank of India v Workmen A.I.R. 1960 S.C. 12 at 21; B.P.Sinha J. in W.B. v Union A.I.R. 1963 S.C. 1241 at 1247; T.L.V.Aiyar in Jialal v Delhi Adm. A.I.R. 1962 S.C. 1781 p.1787; Ranjit Singh v Punjab A.I.R. 1965 S.C. 632 at 637 (a controversial case discussed later); Subha Rao C.J. in Vajravehr v Sp.Dty.Collector A.I.R. 1965 S.C. 1017 at 1021; Grover J. in J.R.Mfg. Co. v Union A.I.R. 1970 S.C. 1589 at 1596 col.1. But the "Statement" has been used as background material in W.B. v Subodh Gopal A.I.R. 1954 S.C. 92 at 104; M.K.Ranganathan v Madras A.I.R. 1955 S.C. 604 at 603; I.T.Commr. v Sodra Devi A.I.R. 1957 S.C. 832 at 839; Kochunni v Madras A.I.R. 1960 S.C. 1080; Jialal v Delhi Adm. A.I.R. 1962 S.C. 1781 at 1787; Vajravehr v Sp.Duty Collector A.I.R.1965 S.C. 1017 at 1021-2; J.R.G.Mfg. Co. v Union A.I.R. 1970 S.C. 1589 at pr.11 p.1595 (some of these cases are discussed by G.P.Singh (supra f.n.1) 127-132. The last mentioned case summed up the law and is discussed later below.

24. See T.K.Musaliar v Venkatachalam A.I.R. 1956 S.C. 246; I.T.Commr. v Sodra Devi A.I.R. 1957 S.C. 832 at 838; Express Newspapers Ltd. v Union A.I.R. 1958 S.C. 578 at 587, 589, 622, 623; Madanlal v S.Chandeo Sugar Mills Ltd. A.I.R. 1962 S.C. 1543 at 1533.

case recourse was permitted to the speeches in the Bombay legislature to justify their ruling that under the proviso of Article 3 of the Constitution the legislature need not be consulted at every stage of the negotiations.[25] In another references were made to speeches in the legislature to determine the nature of the financial emergency that necessitated the Government's taking over an important weaving mill.[26] In Kochunni v Madras[27] Subha Rao J. - as Hidayatullah J. pointed out in a later case[28] - misquoted a portion of the Statements and Objects of the Fourth Amendment Act to substantiate his novel interpretation that Article 31A of the Constitution was only intended to protect statutes connected with agrarian reform.[29] In Golak Nath v Punjab[30] the same judge (on behalf of four other judges) made extensive references to Constituent Assembly Debates to substantiate his view that fundamental rights were intended to be sacrosanct. When the Bonus Act 1965 was challenged at ultra vires the Constitution[31] the Court went into the history of the enactment and recounted the fact that the concept of Bonus was in fact a creation of the judiciary.[32] As a result of the comparison they had misgivings about Section 10(1) of the Statute but did not declare it invalid.[33] In J. R. G. Mfg. Co. v Union[34] the Court's reference to the Statements and Objects of the Statute was largely responsible for their finding that the impugned fiscal statute[35] was intra vires Article 14 of the Constitution.

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25. Babulal v Bombay A.I.R. 1960 S.C. 59 at pr.80 p.55-6.

26. Chiranjit Lal v Union A.I.R. 1951 S.C. 41. Note both these instances are examples primarily of the legislative debates as "facts" of an evidentiary nature rather than extrinsic aids to interpretation.

27. A.I.R. 1960 S.C. 1080. For a different view see Seervai: Constitutional Law of India (1967) 46.

28. Ranjit Singh v Punjab A.I.R. 1965 S.C. 632 at pr. 10, 637.

29. Subha Rao C.J. affirmed his position in Vajravelu v Sp.Dty.Collector A.I.R. 1965 1017 at pr.10 p.1022.

30. A.I.R. 1967 S.C. 1643 at pr.18-24 pp.1656-7.

31. A.I.R. 1967 S.C. 691.

32. Ibid at pr.4-14 p.698-700.

33. See also ibid pr.22 p.704.

34. A.I.R. 1970 S.C. 1588 at pr.11 p.1595-6.

35. Ibid at 1596.

The reference to past legislative history has been haphazard. In W. B. v Union[36] the need for caution was expressed. In I. T. Commr. v Sodra Devi[37] Bhagwati J. rebuked the High Court for not looking at the past history of the enactment[38] which he considered at some length later.[39] In the field of constitutional law past history has been referred to in a large number of cases.[40] In a recent case[41] the Court made extended references to the Joint Committee of Constitutional Reform (1933-4) to determine the scope of Article 131 of the Constitution.

The Indian Supreme Court seems to have made casual references to legislative history, whenever they thought it necessary. This has its advantages but the Court must make a more systematic use of legislative history. This will entail much more research and much wider perspective than the Court has hitherto been used to.[42]

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36. A.I.R. 1963 S.C. 1244 at 1277.

37. A.I.R. 1957 S.C. 832.

38. Ibid at 840 col.1.

39. Ibid at pp.838-9.

40. Gopalan v Madras A.I.R. 1950 S.C. 27 (Kama C.J. at 389; Mukerjea J. at 101; Shastri J. at 73); Shastri J. in Romesh Thappar v Madras A.I.R. 1950 S.C. 124 at 128; albeit later the same judge seemed to be against such a use in S. V. Factory A.I.R. 1953 S.C. 333; Golak Nath v Punjab which according to Imam is a distinct change of methods, see Indian Supreme Court and the Constitution (1968) pp.41-42; Bihar v Union A.I.R. 1970 1446 at pr.5 p.1450; also at p.1451.

41. W.B. v Union A.I.R. 1970 S.C. 1446 at pr.5 p.1450. See also at p.1451.

42. See on this a discussion of the problems and possibilities by H.C.L.Merrillat: The soundproof room: A matter of interpretation (1967) IX J.I.L.I. 521. The Indian approaches discussed at 530-542; the general problems involved at 542-546.

c. The hardship rule : the second escape route.

The Court will however deviate from the literal construction approach to ensure that the statute works. It has at several places declared that it must:not follow a construction that is unworkable,[43] prevent "mischief"[44]"read a law so as to make it valid",[45]"not defeat the intention of the legislature",[46]not allow one section to defeat the operation of the other[47]and apply the rule of harmonious construction to several inter-related statutes.[48]

But the application of these rules is by no means consistent as different judges harmonise different sections differently. A few examples from Constitutional law will illustrate the point. The Supreme Court was called upon to render a harmonious interpretation to Articles 13 and 194(3) of the Constitution on two separate occasions but it reached different conclusions about their inter-relation on each occasion.[49] Again in Nanavati v Bombay[50] the Court tried to give a harmonious interpretation to Article 163 (the Governor's power to pardon) with Article

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43. Subha Rao J. in Shyam Kishori Devi v Patna Mun.Corpn. A.I.R. 1966 S.C. 1678 at pr.8 p 1682.

44. Sevantilal v I.T.Commr. A.I.R. 1968 S.C. 697 at pr.4 p.700.

45. Shah J. in Rajasthan v M.S.Mills Ltd. A.I.R. 1969 S.C. 880 at pr.8 882; T.S.Mankad v Gujerat A.I.R. 1970 S.C. 143 at pr.7 p.146; Advance Insurance Co. v Gurdasmal A.I.R. 1970 S.C. 1126 at pr.1 p.1132.

46. S.Asia Industries v Sarup Singh A.I.R. 1966 S.C. 346 at pr.7 p.349.

47. I.T.Officer v Damodar A.I.R. 1969 S.C. 408 pr.4, p.412.

48. Sanjeeva v Election Tribunal A.I.R. 1967 S.C. 1211 at pr.4 p.1213.

49. M.S.M.Sharma v Srikishan Sharma A.I.R. 1959 S.C. 395 overruled in In Re Article 143 A.I.R. 1965 S.C. 745.

50. A.I.R. 1961 S.C. 112 see infra section on Constitutional Law.

143 (the Supreme Court's power to make its own rules). The majority and the minority reached different conclusions but both claimed that they had given a harmonious interpretation of the two Articles. The famous case of Golak Nath v Punjab[51] interpreted the relationship between fundamental rights (Article 13) and the power to amend the Constitution (Article 368), but the conclusion that they reached was fundamentally different from the one that a differently constituted Court had reached in 1951.[52] There are two interesting cases where Shah J., writing the judgement in both cases, reached a different conclusion on the inter-relation between Article 31(1) and 31(2) of the Constitution.[53]

The Court has always made it clear that in order to avail of this escape route there must be a hardship. In a recent case, however, the Court did not want to soften a rigorous literal interpretation of a statute for the protection of tenants while admitting that the statute was for their protection.[54] This takes us to the crux of the problem. What is a hardship ? Does it depend on :

(i) Hardship with respect to established legal principles;

(ii) Hardship resulting from the facts of the case;

(iii) Hardship in relation to the principles or canons of interpretation;

(iv) Hardship of a public nature. 55

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51. A.I.R. 1967 S.C. 1643.

52. See Shankari Prashad v Union A.I.R. 1951 S.C. 458.

53. See R.C.Cooper v Union A.I.R. 1970 S.C. 564 at 595-596 and pr.62 p.597; contrast Maharashtra v H.N.Rao A.I.R. 1970 S.C.1157 at pr.17 p.1165. See also his comments in Gujerat v Shantilal A.I.R. 1969 S.C. 634.

54. Jai Norain v Kishan Chand. A.I.R. 1969 S.C. 1165 at pr.6 p.1167 (per Hidayatullah J.).

55. These are the four ways of "receiving" a statute outlined by R.Pound: Common Law and Legislation (1908) 21 Harv.L.Rev. 383 at 385.

In the case of the statute involving the tenant, the Court may well have avoided the hardship rule because they thought the tenant undeserving because he tried to get out of paying compensation for damge caused by him fixed by the landlord at a mere Rs 500.[56]

A good example of hardship of the fourth kind may be found in Empress Mills v Municipal Committee[57] where Kapur J. observed :

> "The effect of the construction of import and export in Section 66(1) of the C.P. and Berar Municipalities Act (21f) 1922 insisted upon by the respondent, would make railborne goods passing through a railway station, within the limits of a municipality, liable to the imposition of a tax, on arrival at the railway station, on departing therefrom, or both, which would not only lead to inconvenience and confusion but would also result in inordinate delays and unbearable burdens on trade, both inter and intra state. It is hardly likely that that was the intention of the legislature. Such an interpretation would lead to an absurdity which according to the rules of interpretation is to be avoided." 58

M. P. v Azad Finance Co.[59] is a hardship of the first and third kinds. Here the Court was not prepared to interpret the word "shall" in Section 11(d) of the Opium Act 1878 so as to make it obligatory on the Government to confiscate goods which they had the power to confiscate under that statute. They brought into play the Common Law presumption that a penal statute must be interpreted literally.[60]

Yet another kind of absurdity emerges in Union v Shreeram Durga Prashad.[61] An exporter who had made a profit of Rs 3 crores by under-invoicing the export quota allocated to him was prosecuted under Section 121(a) and Section 23A of the Foreign Exchange Act 1947 read with Section 167(8) of the Sea Customs Act 1878. The Court divided on

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56. Supra f.n. 54 at pr.1 p.1166.

57. A.I.R. 1958 S.C. 341.

58. Ibid at pr. 22.

59. A.I.R. 1967 S.C. 276.

60. Ibid at 278.

61. A.I.R. 1970 S.C. 1537.

the question as to whether he was penally liable or not. Hegde J. (for Bachawat J. and himself) said :

> "(I)t is hard to believe that the legislature intended that any minor mistake in giving full export value should be penalised ..." 62

Sikri J. took the hard line that the fraudulent exporter should be punished :

> "I cannot give an interpretation that will make a mockery of the section." 63

In this case a lot of factors were brought into play. The fact that the exporter had made a tidy sum; the foreign exchange argument (which even Hegde J. considered important[64]); the introduction of the rule that penal statutes must be literally construed; and the fear that the statute would not, if given that interpretation, operate as a rule of law (Sikri J.'s argument). An illustration may be found in a recent case[65] where the Court felt that the legislature cannot be presumed to have intended something contrary to justice and reason.

Examples can be multiplied.[66] The essential point lies in the discovery that the Supreme Court, even though a Court of appeal, in fact uses the Hardship rule to meet the needs of the instant case, using the Common Law presumptions of interpreting statutes and accommodating the public need to preserve its interests. A haphazard policy underlies the use of the hardship rule, but it is useful to help the Court to meet the needs of the instant case.

The most important influences on the Court are the Common Law presumption. To the Court's use of these we now turn.

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62. Ibid at pr. 36 p.1612.
63. Ibid at pr. 23 p.1607 col.2.
64. Ibid at pr.37 p.1612-3.
65. Budhan Singh v Babi Bux A.I.R. 1970 S.C. 1880 at pr.9 p.1883.
66. See G.B.Singh: Principles of Statutory Interpretation (1966) pp.62-74.

d. The Common Law presumptions.

The Common Law has, as a result of historical process, precipitated certain presumptions, which are to be borne in mind while interpreting statutes, and which in turn have an effect on the drafting of statutes. In the main these presumptions are F Statutes do not bind the Crown unless it is expressly stated or can be clearly implied;[67] the jurisdiction of a Court is not to be ousted;[68] penal and taxation statutes are to be strictly construed;[69] remedial statutes are to be liberally construed,[70] and delegated legislation is to be strictly controlled.[71]

All this belongs to a period when the Courts were anxious to protect the individual, hoped to preserve their own jurisdiction, oppose excessive delegation of power, restrict the power to tax and punish, and at the same time respect the prerogative of the Crown by ensuring that it is not bound by statutes.

Jurists aware that these are the product of history have criticised the Common Law system of presumptions. An American jurist thought they were wholly unsuited to modern conditions and suggested that a new scheme involving the protection of a much wider range of interests be evolved.[72] An Australian jurist complained that they leaned in favour

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67. This can be traced to Plowdon in William & Barkly (1562) Plowd 223 at 240; now see Hancock (1940) I All E.R. 32 at 34. Madras Electric Corpn v Boarland (1955) 1 All E.R. 753 at 765. For the background to the presumption see Craies: Statute Law (1971; 7d) 420-429.

68. See Garthwaite v Garthwaite (1964) 2 All E.R. at 241, 242; Pyx Granite Co. Ltd. v Minister of Housing & Local Govt. (1959) 3 All E.R. 1 (H.L.); Anisminic Ltd. v Foreign Compensation Administration (1969) 2 A.C. 147.

69. See generally Craies (supra f.n.67) 525-554 (Penal Statutes),112-116 (Taxation Statutes).

70. See G.P.Singh: (supra f.n.1) 414-418.

71. See Craics (supra f.n.67) p.289 ff.

72. R.Pound: Common Law and Legislation (1908) 21 Har.L.Rev. 383; A survey of Social Interests (1943) 57 Har.L.Rev.1; (1959) III Jurisprudence, generally for an analysis of his scheme of interests.

of an individualistic interpretation :

> "When an individualist Common Law is modified by collectivist legislation, we sometimes see an unsympathetic construction." 73

India has experienced a flood of statutes in the past few decades. The Courts are naturally under pressure to ensure that these statutes not only work but are interpreted sympathetically. A High Court judge summed up the situation very well. Quoting from an American magazine, he observed :

> "'And as the fifties give way to the sixties, the question that India faces is : Can these poor people, multiplying at the rate of 9 million a year, be kept alive under a system of Free Parliamentary Government ? Or will India be forced, in a desparate attempt to keep its masses from starving, to throw aside its democratic institutions (as much of Asia already has) and adopt the ruthless methods of Communist China ?' ... (I)f necessary our Courts should not hesitate to follow the English example and should not interpret the law regardless of the economic emergency facing the nation." 74.

Judges in India believe that the rule of law must be upheld.[75] The problem that they face is to evolve a system of interpretation which will be effective in dealing with India's special problems as well.

The Indian Supreme Court has followed the Common Law system of presumptions, but has made important changes as well. In Corporation of Calcutta v W. B. (1967)[76] in an 8 : 1 decision it abandoned the Common Law rule that a State was bound by a statute; Subha Rao J. for the majority supported the dissent of Wanchoo J. in a 1960 case which had followed the rule.[77]

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73. Paton: Jurisprudence (1964) 3d) 218.

74. Dhavan J. quoting from Newsweek Dec.14, 1959 in R.I.Authority v Kashi Prashad A.I.R. 1962 All 551 at pr.102 p.567.

75. See supra Chapter I Section 3 : The Judge.

76. A.I.R. 1967 S.C. 997.

77. Director of R & D v Corpn of Calcutta A.I.R. 1960 S.C. 1355 (dissent of Wanchoo J.).

The Court has followed the view that taxation laws must be construed in a manner beneficial to the taxpayer.[78] It has followed also the rule that expropriation statutes should be strictly construed.[79] But the Court has not overlooked the fact that there are other nuances that must be borne in mind when considering taxation statutes. Attempts have therefore been made to check tax evasion, although, as a recent thesis on the subject shows,[80] the Courts have not really acquired the equipment to deal with the problem. They have emphasised the principle that a person who claims exemption must prove that he is entitled to it.[81] Again it was emphasised in Gurshai v I.T.C.[82] that the general presumption that taxation statutes must be strictly construed does not apply to the procedural part of the statutes, which will be interpreted so as to make the machinery of collection effective.

But in its substantive approach the Court has made two significant changes, both of which ultimately help the taxpayer. In Moopil Nair v Kerala[83] the Court ruled that in future all taxation statutes will have to bear the brunt of Article 14 of the Constitution. This overrules

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78. A.V.Fernandez v Kerala A.I.R. 1957 S.C. 657 at 661; I.T.C.Bombay v Provident Investment Co. A.I.R. 1957 S.C. 664 at 666; Gurshai v I.T.C. A.I.R. 1963 S.C. 1062 at 1064; Banarsidas v I.T.O. A.I.R. 1964 S.C. 1742 at 1744; J.K.Steel Ltd. v Union A.I.R. 1970 S.C. 1173; J.C.Tax Officer v Y.M.A. Madras A.I.R. 1970 S.C. 1212 at pr.16 p.1217.

79. See G.E.Board v Girdharilal A.I.R. 1969 S.C. 267.

80. K.D.Gaur: ~~Tax Evasion in India~~ Crimes relating to Income Tax in India (unpublished Ph.D. dissertation London 1971). I am grateful to Mr. Gaur for having personally discussed these problems with me.

81. I.T.C. v Rama Krishna Deo A.I.R. 1959 S.C. 239 at 241-2; C.I.T. v Varkaswamyraidu A.I.R. 1956 S.C. 522 at 525.

82. A.I.R. 1963 S.C. 1062 at 1064.

83. A.I.R. 1961 S.C. 552

the view that the Court took in 1951[84] The effect of this will be that taxation statutes will also now be tested under the system of Constitutional limitations from which they were hitherto excused. As an example of how wise this control can be we need only refer to the case of Vajravelu v Sp.Dty Collector[85] where the Court was dissatisfied with the compensation provisions in the impugned statute. They were precluded, however, from considering matters of compensation because of the Fourth Amendment to the Constitution; the Court therefore used the wide powers under Article 14 to declare the provisions ultra vires the Constitution. The second contribution that the Court has made is a technical one. In Venkataram & Sons Ltd. v Madras[86] the Supreme Court overruled the Privy Council[87] and held that an assessment of tax, where the charging section is ultra vires, is not an assessment under the Act. This gives the Courts the power to declare an assessment void ab initio, even though their jurisdiction is otherwise ousted. But the struggle between preventing tax evasion and protecting the individual continues. No definite patterns[88] have emerged in the general approach to the problem, though (as we shall see later) in individual cases the Court has been vigilant.[89]

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84. Ramji Lal v I.T.O. A.I.R. 1951 S.C. 97; Purshottam v B.M.Desai A.I.R. 1956 S.C. 20; see further Khandige Sham Bhat v Ag.I.T.O. A.I.R. 1963 S.C. 591; Rai Ramakrishna v Bihar A.I.R. 1963 S.C. 1667; V.V.R.Varma v Union A.I.R. 1969 S.C. 1094; Kattantal & Co. v Assor Auth.Patiala A.I.R. 1970 S.C. 1742; Commr.I.T. v K.V.T.Co. A.I.R. 1970 S.C. 1734.

85. A.I.R. 1965 S.C. 1017.

86. AI.R. 1966 S.C. 1089.

87. Raleigh Investments Co. v G.G.in Council A.I.R. 1947 P.C. 78 at 81.

88. See generally K.D.Gaur (supra f.n.80).

89. Baidyanath Ayurved Bhagwan v. State Comm. A.I.R. 1971 S.C. 378 at pr.8 p.380; A.I.R. 1971 N.S.C. 13.

The Court has been careful to ensure that the jurisdiction of Civil Courts is not ousted by legislation.[90] It has made an extended interpretation of its own jurisdiction (as we shall see later[91]) and sought to examine detailed questions of election and industrial law.

But it is in the area of strict liability that the Court has made a significant contribution. It has always upheld the view that a penal statute must be strictly construed.[92] But the Court has considered each offence on its merits. Often a mens rea clause is missing from a statute but the Court has imputed the mens rea provision.[93] The case law is by no means uniform.[94]

In Nathulal v M. P.[95] the Court took into account the heavy penalty of an offence under Sections 3 and 7 of the Essential Commodity Act, and introduced the concept of mens rea into the offence. But in Sarjoo Prasad v U.P.[96] the Court felt that an offence under Section 7 of the Prevention of Food Adulteration was an offence of strict liability.

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90. See Dua J. in Srinivasa v A.P. A.I.R. 1971 S.C. 71 at pr.7 p.75 quoting the 8 propositions declared by Hidayatuallah J. in Dhulabhai v MPP. A.I.R. 1969 S.C. 78; see also Ram Sarup v Shikar Chand A.I.R. 1966 S.C. 893 following Shree Bhagwan v Ramchand (A.I.R. 1965 S.C. 1767) at pr.14 p.897; Abdul v Bhawani A.I.R. 1966 S.C. 1718. For earlier case law see G.P.Singh (supra f.n.70) Chapter 9, pp 357 ff.

91. See Chapter II Section 6 (infra).

92. Mahajan J. in Tolaram v Bombay A.I.R. 1954 S.C. 496 at 498-9; Subba Rao and Wanchoo JJ. in Asst.Collector v Sitaram A.I.R. 1966 S.C. 955; Motil Bhai v F.P.Co. v Collector Central Excise A.I.R. 1970 S.C. 829 (per Hegde J. where it was held that only so much of the mixture as was non duty tobacco could be confiscated under the Control Excise Rules (1944) R.40 see pr.11 p.832.)

93. See the obscenity case Ranjit Udeshi v Maharashtra A.I.R. 1965 S.C. 881 at pr.10 p.888 discussed infra Chapter VI.

94. Indian Law Institute (ed) Essays on the Indian Penal Code 58-9. I was directed to this by G.P.Singh (supra f.n.70) p.452 pr.13.

95. A.I.R. 1965 S.C. 116.

96. A.I.R. 1961 S.C. 631 at 632-3.

It has taken a similar stand where foreign exchange has been involved.[97] In Gujerat v Kansaram[98] the Court introduced the principle of vicarious liability with respect to a statute which involved an offence under Section 63 of the Factories Act 1948. The Common Law approach to the subject[99] was not subverted but the judges seemed more aware of the need to make the statute work rather than the Common Law principle that a person cannot be found guilty for a crime committed by others. This new approach to problems of strict liability is significant and further examples of this can be seen in the area of preventive detention, later.[100]

The Court's attitude to the delegation of power will be examined later. It is slowly becoming aware of the needs of the administration. But it is faced with a dilemma. On the one hand legal tradition demands it preserve a doctrinnaire Common Law distrust of the administration, and on the other Indian needs necessitate it has to make allowances for administrative needs. Thus, in Union v J. N. Sinha (1971)[101] it was called upon to apply the rules of natural justice to a case where the respondent was served with a compulsory retirement order. The Court refused to do this on the grounds that it must preserve

> "the balance between the rights and interests of the individual Government servant and the ... public." 102.

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97. See Indo-China Steam Navigation Co. v Jasjit Singh A.I.R. 1964 S.C. 1140 at 1149-50; Maharashtra v M.H.George A.I.R. 1965 S.C. 722; see Sikri's dissent in Union v Shreeram Durga Prashad A.I.R. 1970 S.C. 1537.

98. A.I.R. 1964 S.C. 1893 at 1897.

99. See Smith & Hogan Criminal Law (1969) 98-109. see also the recent House of Lords case Tesco v Nattrass (1971) 2 All E.R. 127 where a distinction was made between delegating a duty and delegating the performance of a duty.

100. Infra Chapter III.

101. A.I.R. 1971 S.C. 40.

102. Ibid at pr.8 p.43.

distinguishing very sensitively earlier case law where the rules of natural justice were applied to cases in which the rights of the individual were affected.[103]

The Court appears to have followed the Common Law system of interpretation, but is making important changes to meet the needs of the statute involved and the instant case. A Chief Justice of India seems to confirm this when he says :

> "The basic principles of statutes (as also documents which are the parent source) do not change essentially from one country to another(;) but in construing statutes in different environments differences do develop. These cannot be left unnoticed. The task of the writer is not to cull the principles mechanically from various sources with a view to their inclusion in various chapters of his book, but to explain the light and the shadow, the nuances and the inherent dissimilarities." 104.

e. Conclusion

The Supreme Court has not evolved a new theory of statutory interpretation; nor has it wholly followed the Common Law system of interpretation. The policy that the Court has followed has been haphazard. It has made extended use of legislative history, particularly in constitutional matters, and this has been responsible in more than one case for the view that they have taken on a particular point of law. Thus a writer on Constitutional Law has shown that a large part of the Constitution was in fact interpreted in the light of Constitutional history.[105] The Court has, however, not accepted the rule that legislative history can in fact be looked at. Will they in future establish

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103. Distinguishing Orissa v Binpani Dei A.I.R. 1967 S.C. 1269; Kraipak v Union A.I.R. 1970 S.C. 150.

104. Hidayatullah: Preface to G.P.Singh(supra f.n.1).

105. M.Imam: Indian Supreme Court and the Constitution (1966) Chapter III

a new rule in this regard, or merely make references to the legislative history of particular enactments in order to elicit the object of the statute ? The fact that the English Law Commission has chosen to recommend the abandonment of the Common Law approach to the subject may considerably help the Supreme Court to make up its mind to follow a similar course. Given India's context and the complicated nature of some of its enactments, there is a need to follow a new rule.

The Court has made full use of the hardship rule to meet the four kinds of hardship that we have outlined above. These hardships are however bound up in the Common Law system of interpretation to which the Court has adhered closely. But within the structure of the Common Law it has weaved a local pattern, which is not, at this stage, easily discernable. A notable contribution is their effort to extend the concept of strict liability. It will take time before the Court can, patiently adding precedent to follow on precedent, evolve a scheme wholly suited to India's needs. As yet no predictable pattern has emerged.

3. The Supreme Court's Analysis of the Constitution.

It is not necessary to sketch the historical background of the Constitution[1] nor to trace where the Supreme Court followed "history, foreign doctrine or the text of the Constitution".[2] Nor is it necessary

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1. On Constitutional history before the passing of the Government of India Act 1935, see A.B.Keith: Constitutional History of India 1600-1935; Sir P.S.Sivaswamy Aiyar: Indian Constitutional problems (Tarporevala & Sons Ltd. Bombay 1928) describes very adequately the situation before the 1935 Act. For the background to the Act see the Report of the Indian Statutory Commission (popularly known as Sir John Simon's Report) Vols. I and II (Cmd. 3568 and 3569 respectively). The 1935 Act itself is discussed by P.Eddy and F.H.Lawton: India's New Constitution (London 1935); S.M.Bose: The working Constitution of India (Calcutta 1939); P.N.Murthy and K.V.Padmanabhan: The Constitution of the Dominion of India (Delhi 1947); Sir Maurice Gwyer and A.Appadorai: Speeches and documents on the Indian Constitution (Vols. I and II) (London O.U.P. 1957) is a good anthology of the basic documents on the subject. A lot of research has gone into the actual framing of the Constitution. The discussions are recorded in the Constituent Assembly Debates (C.A.D. 1947-50) in 12 Volumes. Other background material has been compiled in B.Shiva Rao (Ed.): The Framing of India's Constitution, Vols. I-V (Rev. in A.I.R. 1970 Jnl. 105-08) (N.M.H. 1968). Further research theses include P.K.Ghosh: The Constitution of India (How it has been framed) (World Press Ltd. 1966). The best account of the background is Granville Austin: The Indian Constitution: Cornerstone of a nation (O.U.P. 1966). But one must be wary of Austin's account. While it is the most comprehensive work to date, it suffers from the fact that he is far too sympathetic to the social revolution that he thinks the Constitution intended to herald. But Upendra Baxi's review: The little done the vast undone - Some reflections on reading Granville Austin's The Indian Constitution (1967) 9 J.I.L.I. 323-423 is hasty, ill-considered and unfair. It is almost as if Baxi were trying to get something off his chest for a long time, and used this as an opportunity.

2. This has been dealt with by M.Imam: The Indian Supreme Court and the Constitution (1966)(Eastern Book House, Delhi). But one cannot agree with him on all matters, for example the Supreme Court's interpretation of the power to amend the Constitution has been treated as an example of textual interpretation (Chapter V, Section 13, pp 321 ff.) For an uncritical review see M.Hidayatullah's introduction to the book and the review at A.I.R. 1970 Jnl. 90-91.

to write a commentary summing up the Constitutional provisions.[3] All this has been dealt with by other writers. Nor is it necessary to examine the thesis of a foreign observer, that the Constitution is at variance with Hindu society, because all that that observer has done is to presume that Hindu society is static and juxtaposed it against the possibility of dynamism which the Constitution has the capacity to empower.[4]

Critical commentaries are, however, few and far between[5], although as a result of a changed approach in the Supreme Court after

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3. The best account of this is Seervai (1967, with a supplement for 1968) reviewed G.Marshal (1970)P.L. 37. For other accounts see M.P.Jain: Indian Constitutional law (1970/2d). D.D.Basu: Commentary on the Constitution of India (V Volumes now in the Fifth Edition) for an account comparative with other Constitutions. There is also a shorter version in one volume. A Gledhill: The Constitution of India (1964) now out of date. V.N.Shukla: The Constitution of India (1970 Allahabad); C.S.Anjanwala: The Constitution of India (1969 Bombay) rev. A.I.R. 1970 Jnl. 28. D.N.Banerji: Some aspects of the Indian Constitution (World Press Ltd. 1966); G.V.Venkata Subba Rao: Constitutional Law Vol. I (the others have not been published yet). For the only case book on the subject N.A. Subramaniyam: Case law on the Indian Constitution (Madras 1969) rev. A.I.R. 1970 Jnl. 137-8. G.N.Joshi: The Constitution of India (Macmillan 1967); B.N.Sharma: The Republic of India (1966, Delhi, A.P.H., 1966 pp.125-429).

4. This is an extremely fanciful thesis by V.C.Watson: The Indian Constitution and the Hindu tradition, A thesis in part fulfilment of a Ph.D. North Western University U.S.A. 1957 (SOAS Microfilm No.1123). The thesis tries to cover Indian ways of thinking from Chandra Gupta Maurya to the present day, trying to show that certain traditional decision making centres like the Panchayat and the family decentralised the structure and that this feudal pluralism interfered with the overtly overcentralised Constitution. The assumptions about Hindu society as well as the Constitution are over generalised. Hindu institutions have an internal system of volition (as we shall see in later Chapters IV-VI). The centralisation in the Constitution is of an impersonal nature for to the Hindu the only relevant decision making body will continue to be the Civil Servant whose position and role has not been undermined in any way. Further, his position and status is nothing new to India - the office can be traced back as a by no means unusual way of administering the country from Mauryan days.

5. For the non-critical literature see V.N.Shukla (supra f.n.3), C.S. Anjanwala (supra f.n.3.), N.A.Subramaniyam (supra f.n.3). Even Prof. G.V. Venkata Subha Rao's lectures are by no means very critical in their approach. For a typical example of such an approach see R.C.Agarwala: Constitutional History of India and(the) National Movement, Book III.

1960 (especially in the area of property as we shall see) a steady stream of critical literature is emerging.[6] In more recent years several Supreme Court judges have themselves published observations on the Constitution.[7]

We will first ask the preliminary question, whether the Court has allowed "neutral principles"[8] to be sacrificed in favour of declaring broad principles to achieve "ad hoc" results. Secondly, we will examine how the Supreme Court has tried to balance the various contending interests -

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6. In the fifties, partly because of the lack of theoretical nourishment and partly as a result of a paucity of Indian Constitutional precedent, critical accounts indulged in too much cross referencing with other constitutions. A typical example of this is Jennings: Some aspects of the Indian Constitution (1953). For a sympathetic account for the same period see W.Douglas: Studies in Indian and American Constitutional Law, from Marshall to Mukerjea (Tagore Law Lectures by an American Supreme Court Judge reviewed from a somewhat western slant by L.R.Subramaniyam:(1956) University of Chicago Law Rev. 563-570). But after the case of Kochunni v Madras A.I.R. 1960 S.C. 1080 where Subba Rao J. for the first time evolved a new approach to an important provision of the Constitution, based solely on considerations demanded by the Constitution, we see the emergence of critical literature, e.g. Setalvad: The Indian Constitution (1950-1965); Seervai (1967); M.Imam (supra f.n.2); G.N.Joshi: Aspects of Indian Constitutional Law (1964); Seervai: The position of the Judiciary in the Indian Constitution (1970) rev. (1971) 13 J.I.L.I. 134-41; P.B.Mukharji: The critical problems in the Indian Constitution (1968) rev.(1968) VIII Indian Advocate 117-118.

7. Gajendragadkar: The Constitution of India (O.U.P.1969/70); K.Subba Rao: Our Constitutional problems (1970) rev. somewhat flatteringly by S.Lakshminarasu (1970) X Indian Advocate 180-185; The Philosophy of the Indian Constitution (1969 Bangalore) rev. at A.I.R. 1970 Jnl. 178-9; Convocation Address Madras University 1962 quoted in G.N.Joshi (supra f.n.6) 135-6, 192-3; The Ideals of our Constitution (Swaraj Ann.No.1968) 43-7; Frequent Amendments to the Constitution, Hindu Jan.26,1968; M.Hidayatullah: Democracy and the judicial process in India (1968); Judicial methods (B.N.Rau Lectures 1970); Press & Parliamentary Privileges (1968) reprinted (1968) Jnl.of Const. and Parl. Studies; Judiciary, Executive and Legislature under the Constitution, Mail Feb.26,1968; Role of the Judiciary in the present context, Sanik Samachar (April 1968) pp.6-30; J.M.Shelat: The spirit of the Constitution (Bhartiya Vidya Bh. 1967 p.50); T.L.V.Aiyar: Evolution of the Indian Constitutional Law (1966); K.N.Wanchoo: Role of the Supreme Court in the Constitution (1968) Civil & Military Jnl.of Law (I only have a transcript of this, very kindly supplied to me by Dr. S.N.Jain, Director, Law Institute); K.S.Hegde: The Directive Principles of State Policy (B.N.Rau Lectures) reprinted in (1971) I S.C.Jnl. 50 ff.

8. This is a term used by Professor Weschler and is clearly defined below.

some of them peculiar to India - that have sought recognition within the Constitutional set up, and the extent to which the Supreme Court has deviated from traditional patterns of interpretation and why it has done so. Thirdly, we shall examine whether any new patterns of interpretation have emerged on the basis of the Directive Principles of State policy.

A. The Neutrality Principle

The question of "neutral principles" in interpreting Constitutions was first raised by Professor Weschler[9] in Harvard in 1959 raising a great deal of controversy.[10] Dr. Imam has made a similar plea that such principles be followed in India[11] - though regrettably without much discussion. Another constitutional lawyer in India has made a similar, though slightly differently phrased, plea.[12]

Professor Weschler was anxious to prevent judicial decision making from taking short cuts by advocating broad principles merely to deal with the cumbersome peculiarities of the instant case, and asked judges to endeavour to arrive at neutral principles by "principled decisions" rather than ad hoc excuses.

> "A principled decision ... is one that rests on reasons which in their generality and neutrality transcend any immediate result that is involved." 13.

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9. The Oliver Wendell Holmes Lecture: Towards neutral principles of law (1959) 73 Har.L.Rev. 1 (reprinted with some additions in Weschler: Principles, law and politics (1961) Chapter I. But the additions are insignificant).

10. See Miller and Howell: The myth of neutrality in Constitutional interpretation (1960) 27 Univ.of Chic. Law.Rev. 661; Pollack: A reply to Prof. Weschler (1959) 108 Univ.of Penn.L.Rev. 108; B.Wright: The Supreme Court cannot be neutral (1962) 40 Texas Law Rev. 599; M.P.Golding: Principled decision making in the Supreme Court (1963) 63 Col.L.Rev. 35.

11. Imam: The Supreme Court and the Indian Constitution (1968) 25-7.

12. Seervai (1967), Preface viii-ix where he makes a plea that socio-economic questions should not persuade the Court to take a stand while interpreting the Constitution.

13. Weschler: (f.n.9) at p.19.

Before we proceed any further let us be very clear as to what we are talking about. It has been argued that :

> "neutrality is too ill-defined a yardstick to measure either the rare failures or the many achievements of the Court." 14

We are in no way trying to say that the Court must never assume a "stand", which must inevitably result from a broad discretionary jurisdiction. To that extent

> "the process of 'non-neutrality' continues today and will continue as long as the judiciary is part of the governmental system" 15

It must be clear in both America and India

> "even to the blindest partisan ... (that) the Court has never been either purely judicial or legislative in its work." 16

It cannot, for example, be "non-neutral" for the Court to uphold certain values like "protecting the individual from the Leviathan of government"[17] for that is implicit in the Constitution itself. What is being criticised is the manner in which a decision is arrived at, so that broad principles are allowed to emerge from a problem case. As an Indian Constitutional lawyer puts it :

> "Paradoxically enough, the greatest danger to the administration of justice and constitutional interpretation arises from a genuine desire of judges to do justice in each individual case." 18.

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14. Wright: (supra f.n.10) at 603, 616.
15. Miller and Howell (supra f.n.10) at 675.

16. Kurkland: Towards a more political Supreme Court (1970) 37 Univ.of Chic.L.Rev. 19 at 21.

17. Kurkland: (supra f.n.16). Subba Rao J. states a similar value approach to the Indian Constitution in Basheshwar Nath v I.T.Commr. A.I.R. 1959 at pr.90 p.183.

18. Seervai (supra f.n.12). At p.ix. As a day to day example of this note a newspaper comment on an English judge who is praised because he "earned a reputation for riding roughshod over more pernickety points of law in his search for the merits of a case". See Mandrake: Court with a human face Jan.30,1972, Sunday Telegraph ~~[illegible]~~ Good judges decide good cases but often make bad law.

This Weschler believed happened in the United States in the segregation and movie censorship cases,[19] and this is what has happened in India. One good illustration is the interpretation of the right to property, where the Court (faced with the task of doing justice to the claims of landlords whose property had been taken away with insufficient compensation and cheated out of applying the principles of "eminent domain") propounded principles of review with respect to areas from which their jurisdiction had been specifically excluded by Constitutional amendment.[20] This is more fully discussed in Chapter III, but we will take a few examples here.

Some examples

In Kameshwar Singh v Bihar (1952)[21] the Court was obviously troubled by the fact that under the impugned statute[22] one petitioner would have to pay Rs 600,000 instead of receiving compensation; in two cases no compensation would be paid at all and in one case a "mere" Rs. 14,000.[23] The Court accepted, and Mahajan J. makes it clear that from this

> "one cannot jump to the conclusion that the whole of the enactment is a fraud on the Constitution." 24

But the learned judges thought a part of it might be a fraud with respect to some persons.[25] In order to achieve a satisfactory solution, amidst wholesome lectures on "eminent domain", two broad principles were

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19. See the lecture cited f.n.9.

20. The First Amendment Act 1951. The Court agreed that its jurisdiction had been ousted (on this all the judges are agreed in Kameshwar Singh v Bihar A.I.R. 1952 S.C. 252) and that this had been done by a valid Constitutional Admentment. (See Shankari Prashad v Union A.I.R. 1951 S.C. 458- this case was however overruled in Golak Nath v Punjab A.I.R. 1967 S.C. 1643).

21. A.I.R. 1952 S.C. 252.

22. Bihar Land Reform Act (XXX of) 1950.

23. See supra (f.n.21) para 57, p.275.

24. Ibid at para 58, p.276.

25. Ibid.

formulated. The first was the "doctrine of colourable legislation",[26] which the Court pruned down the very next year in Gajapati v Orissa (1953)[27] where they made it clear "at the outset" that the doctrine was not concerned with the legislature's malafides but its competence. Indeed in Kameshwar's case it is not difficult to show that the Court dealing with a difficult situation, was really dealing with legislative malafides, but constantly juxtaposing the statute against the principles of eminent domain. This was an important factor that persuaded them to decide that the acquisition of a debt (technically a chose in action) was a colourable usurpation of power. This is the second broad principle that they declared, viz. a chose in action cannot be acquired. At least one judge doubted the validity of the rule.[28] The rule rests on the supposition that the power of eminent domain cannot be used to enrich the coffers of the State.[29] It is certainly not clear from the judgement as to what exactly in the statute was objected to; was it that choses of action are not property, or, that it was a forced loan and therefore against "public policy" or, simply that it did not come within the purview of legislative competence as stated in Entry 36 of List II of the Seventh Schedule of the Constitution ?[30] Despite this obvious lack of clarity this doctrine declared in Kameshwar's case[31] was later followed

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26. On which see Seervai (1967) 65-73 and Chapter III infra.

27. A.I.R. 1953 S.C. 375 at pr.9 p.379 per Mukerjea J.

28. Das J. at A.I.R. 1952 S.C. 252 at pr.99 p.266-7.

29. All these reasons appear to have the support of Mahajan J. at para 55 p.275.

30. See Mukerjea J. at pr. 82 p.268. He is the author of the judgement in the case of Gajapati v Orissa (supra f.n.27).

31. Supra f.n.21

by the Court in three cases. The confusion that it caused was apparent. In Bombay Dyg. and Mfg. Co. v Bombay (1958),[32] a totally dissimilar case, the Court emphasised, referring on the earlier case,[33] that they rested their decision that the appropriation of a debt was ultra vires the Constitution on the ground that compensation was not paid (something that the Court could not enquire into in Kameshwar's case) and left open the question whether choses of action can be acquired.[34] Yet a nebulous broad principle had been precipated and in M. P. v Ranojirao Shinde,[35] Hegde J. assumed ten years later that choses of action cannot be acquired. He said :

> "So far as we are concerned, this question is concluded by the decisions of this Court ... " 36

while admitting that Kameshwar's case was totally irrelevant to the instant case.[37] The principle has now been confirmed by Hegde J, Ahmdabad Mun. v New Spg. and Wvg. Co.[38] Thus a broad principle seems to have seeped through, occasioned by the needs of the instant case.

Again, the mischief of a non-neutral decision appears to have crept into other areas where the right to property has been involved. Contrast the restrictive interpretation of the word "compensation" in W.R.E.D.Ltd. v Madras[39] with that in Jee Jee Bhoy v Bombay.[40] These were

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32. A.I.R. 1958 S.C. 328.

33. Ibid at pr.11, p.333-4.

34. Ibid at pr.10, p.333.

35. A.I.R. 1968 S.C. 1053.

36. Ibid see pr.7-8 p.1056-8 for the earlier case law. The quotation is from para 8 p.1057.

37. Ibid at pr.9, p.1058.

38. A.I.R. 1970 S.C. 1292 at para 10 p.1289.

39. A.I.R. 1962 S.C. 1753. at pr.26-27, p.1763-4.

40. A.I.R. 1965 S.C. 1096.

both cases to which the Fourth Amendment did not apply. But the broad principle declared in the latter case was allowed to filter through to cases to which the Amendment did apply,[41] to amaze at least one Chief Justice, who was a silent participant to the whole process. Later, looking back on what had happened, he openly admitted :

> "The judgement in the two cases (i.e. the pre-amendment and the post amendment case) were delivered on the same day ... (I)t escaped me that the discussion was in the wrong case and the other merely followed it." 42.

Yet this new approach to compensation, though repudiated later,[43] has been revived and still continues.[44] Again, as we shall see later, to meet the needs of the instant case Subha Rao J. (responsible for the confusion in the "compensation cases") insisted on the broad principle that in interpreting Article 31A of the Constitution, there is a super-added condition that the statute must be connected with agrarian reform.[45]

Nor are"neutral principles" limited to situations where property rights are involved. In Kasturi Lal v U. P.[46] the Supreme Court restricted the liability of the Government by a broad formulation of principle,[47] distinguished earlier case law[48] and misrepresented the Common

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41. See the cases of Vajravelu v Sp.Dty Collector A.I.R. 1965 S.C. 1017, Metal Corpn v Union A.I.R. 1967 S.C. 637.

42. Hidayatullah J. in ~~Shanti Lal v Gujerat~~ Gujarat v. Shantilal A.I.R. 1969 S.C. 634 at pr.1 p.637.

43. Ibid, in the judgement delivered by Shah J; for a sympathetic account of the whole process see U.Baxi (1969) IX Jai.L.J.

44. Shah J. in R.C.Cooper v Union A.I.R. 1970 S.C. 564. For an unsympathetic account of the process see Seervai: The Bank Nationalisation case (1970 lecture).

45. Chapter II infra deals with this development. It all began with Kochunni v Madras A.I.R. 1960 S.C. 1080, followed in Vajravelu v Sp.Dty Collector A.I.R. 1965 S.C. 1017. See on this Atul Setalvad: (1965) 67 Bom.L.R.Jnl. 105.

46. A.I.R. 1965 S.C. 1039 (per Gajendragadkar J.)

47. Ibid at pr.21 p.1046.

48. Notably the judgement in Vidyawati v Rajasthan A.I.R. 1962 S.C. 933.

Law principle of vicarious liability,[49] in relation to Government servants. The occasion arose because they did not want to hold the Government liable where one of its servants had absconded to Pakistan with some gold that was evidence in a Court case. At least one High Court judge was perplexed by this, circuitously followed the Supreme Court,[50] and criticised them extra-judicially.[51]

Again the Supreme Court has made non-neutral formulations to ascertain what enactments of princely rulers are to be regarded as law within the meaning of Articles 366 and 372 of the Constitution (each formulation depending upon the importance of the particular law involved).[52]

It has been suggested that in the Advisory Opinion in the legislature case[53] the majority wanted to protect the prestige of the judiciary and declared unnecessarily a broad principle on the relationship between fundamental rights and parliamentary privileges, and that only Sarkar J. (in dissent) made the "principled decision" in the case.[54] The controversy that followed supports this view.[55] In Basheshwar Nath v I. T. Commr.[56] Das C.J. made an appeal that the instant case did not call

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49. See Ilkew v Samuels (1963) II All.E.R. 879; see also Dhavan J. in Chottey Lal v U.P. A.I.R. 1967 All 327 at pr.9 p.329.

50. Dhavan J. in Chottey Lal v U.P. supra f.n.49.

51. Dhavan: A historical survey of India's judicial system, Allahabad Centenary Volume I, 53 at 58. See also Dhavan J.'s judgement in Prem Lal v U.P. A.I.R. 1962 All 233 at pr.8 p.236 where he makes a plea that the State ought not to claim privileges.

52. See on this the article by D.S.Mishra: Definition of law and the Supreme Court (1968) 10 J.I.L.I. 434. The writer does not specifically make the point about non-neutrality, but the comment can be made on the basis of discussion by him.

53. Re Article 143 A.I.R. 1965 S.C. 745.

54. D.N.Banerjee: The Supreme Court on the conflict of jurisdiction between the Legislative Assembly and the High Court of Uttar Pradesh (World Press Ltd. 1966). A similar charge is made by Seervai (1967) pp 837 ff. Note the latter argued the case for legislature. For a defence see: The law of Parliamentary Privileges in UK and in India by P.S.Pachauri (1970) N.M.F.

55. Setalvad: My Life pp.531-533.

56. A.I.R. 1959 S.C. 149.

for the declaring of a general principle on the problem of waiver of fundamental rights,[57] but the rest of the Court seemed to declare such a principle for doctrinnaire reasons.[58] In Golak Nath v Punjab[59] five of the majority judges declared one broad principle (Part III of the Constitution is sacrosanct) followed by another second principle (the doctrine of prospective overruling) to avoid the consequences of the first, without even bothering to examine the provisions of the Statute before them which only the sixth majority judge did. They naturally incurred the scorn of a minority judge who accused them of replying to a political "argument of fear".[60] More recently, in E.M.S. Namboodripad v Kerala[61] the Supreme Court found the Chief Minister of Kerala guilty of contempt of court for scandalising the judges because, he said, they were part of a middle class state; but reduced his fine because they taught him the "correct" Marxist position on the problem. What was the ratio of this decision (which has been praised for its brevity[62]) ? One commentator wryly seems to suggest that it was that a lecture on Marxism will reduce a sentence, adding however :

> "But I fear that if people were to qualify for conviction for misunderstanding Marx, the queue of offenders would be very long." 63

What emerged from the Court's didactic spree was a broad law of contempt,

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57. Ibid at pr.12 p.157. See further on this point: Nathaniel Nathanson (1962) 4 J.I.L.I. 157 at 160 praising S.K.Das J. for avoiding the problem altogether.

58. e.g. Bhagwati J. at pr. 90 p.183.

59. A.I.R. 1967 S.C. 1643.

60. Wanchoo J. at ibid p.1700. See Setalvad: My Life (1971) p.587, who quotes this passage.

61. A.I.R. 1970 S.C. 2015.

62. V.K.S.Nair: On Judgements (1971) K.L.T.Nnl. 11-12.

63. G.N.Achaya: Blitz Dec.26, 1970, p.17.

which dealt with the one modern authority cited before it in the briefest possible terms.[64]

Examples can be multiplied and will be apparent later in the thesis.[65] The Court is evolving dangerous patterns. Ad hoc generalisations perpetuating broad constitutional principles have rightly been called "the deepest problem of our times".[66] The judges seem to be aware of this and at least one Chief Justice tried his best to explain that the principle behind the cases that led to a constitutional amendment were not to be treated as declaring the wide principles that they were alleged to pronounce.[67]

This formulation of "non-neutral" principles (whether as a result of technical jugglery to deal with the problems of the instant case[68] or as part of a self-protecting polemic[69]) may be one reason why the Court has found itself in the unfortunate controversies that appear to centre around it. Political diatribe and a lack of faith in its neutrality seemed to have joined hands to present an impressive, though not fully justified, case against it.

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64. The case of R. v Metropolitan Police Commr. (1968) I All.E.R. 319 This case is discussed in Chapter VII Section 2 pp 558 ff.

65. See Chapters III, IV, VII.

66. Weschler (supra f.n.9).

67. P.Shastri at the Madras Lawyers' Conference A.I.R. 1955 Jnl. 25 at 29-30.

68. As in Kameshwar v Bihar A.I.R. 1952 S.C. 252.

69. As in the Contempt case (supra f.n.61).

2. Balancing contending Constitutional Interests

A Constitution may be, and in this case is, a means of dividing power between the Centre and Federal units and prescribes the manner in which this power is to be exercised by organs of the State.

The Indian Constitution follows the federal principle and divides power between the Centre and the States; it invokes the principle of separation of powers to control the exercise of power, following both the American and the British models, leaving the judiciary in the uneasy position of being responsible for controlling ultra vires exercises of power in the American sense of the word but possessing only the equipment and techniques of the British model; it accepts the western theory of Constitutional limitations in the form of a Bill of Rights; it deals with a large variety of peculiarly Indian interests and imposes detailed rules concerning group minorities and religious institutions. Lastly in its directive principles of state policy, it enunciates certain rules of constitutional interpretation, which theoretically can have the effect of superseding the normal rules of constitutional and statutory interpretation on the subject.

The Constitutional interests involved in such a set up are :

A. A federal interest.

B. The interest of the Government :

   i. as an abstraction.

   ii. as conditioned by the principle of separation of powers.

C. The State - its interests as an organisation (with its problems of official secrecy and law and order).

D. The executive and its need to exercise both administrative and legislative power.

E. The judicial interests :

i. In its own independence.

ii. in maintaining its own jurisdiction.

iii. in controlling the exercise of executive power sanctioned by the Constitution.

F. The legislative interests :

i. in its own supremacy.

ii. in maintaining its privileges.

G. i. The interests of the individual (both personal and proprietary).

ii. The socio-economic interests of the whole that sometimes conflict with the demands of the individual.

H. The problem of protecting group life within the nation, and violating the principle of equality with respect to such groups that need protective discrimination if they are to achieve, let alone enjoy, equality.

Normal constitutional theory,[70] based on a curious combindation of Montesquieu, Blackstone, the French Revolution, Dicey and the Common Law,[71] protects G(i),[72] is afraid of B(i),[73] respects C,[74] has recently realised that G(i) must yield to G(ii) (for even Dicey foresaw the change

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70. See for example Keeton: Elementary Principles of Jurisprudence (1949) 267-268.

71. On the Common Law aspect see Judge Dixon's paper (in relation to the Australian Constitution): The Common Law as the ultimate Constitutional Foundation (1957) 31 Australian Law Jnl. 240.

72. As a good example see W. Douglas: Studies in Indian and American Constitutional law (1954) Tagore Law Lectures.

73. See Subba Rao J. Basheshwar Nath v I.T.Commr. A.I.R. 1959 S.C. 149 at pr.90 p.183.

74. See below Chapter IV on public order and Chapter VII on official secrecy.

from "individualism to collectivism"[75]), has regarded the need for D as tragic but inevitable,[76] has sought to preserve F as well as E (albeit in the latter case American theory tends to use the judicial process to juxtapose a polarity of power against the other organs of Government), supports the "State interests", but with the New Deal has come to recognise the need for a constitutional revolution to usher in the need for federal supremacy,[77] regards H as a new problem that conflicts with the principle of equality.[78] Constitutional theory has in the past neglected to provide principles of interpretation other than those used in statutory interpretation and though some socio-economic principles have emerged, they are regarded as suspect.[79]

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75. Dicey: Law and public opinion in England. For a translation of those principles see Paras Diwan: Nationalisation under the Indian Constitution (1953) S.C.J. Jnl.21; Das J. in Chiranjit Lal v Union A.I.R. 1951 S.C. 41.

76. Dicey modified his views in an article called The Development of Administrative Law (1915) 31 L.Q.R. reprinted as an Appendix to Law and the Constitution (10 Edn.). The major attack came from Lord Hewart: The New Despotism (1929) which in its turn led to the formation of the Donoughmore Committee (Cmd 4060) which accepted as tragic but inevitable the Government's increase in power. A far more responsible attitude accepting the needs of the Government was shown by Laski in his dissent, and Robson in Justice and Administrative Law (1925). Gradually theorists seem to have changed their minds. For an example note the change in views of Sir C.K.Allen from Bureaucracy Triumphant (1934) to Law in the Making (1964/7d). Jurists today accept the need for power but emphasise judicial review. See Wade: Administrative law (1971/3d); Smith: Judicial review of administrative action (1968). For an Indian account see M.A.Fazal: Judicial review of administrative action (1969 O.U.P.).

77. Very adequately described in Corwin: Constitutional Revolution Ltd. (1941).

78. This is dicussed in Chapters III and VII.

79. See Latham J. quoted by Seervai (1967) viii. But his own views are discussed at viii-ix.

The Indian Supreme Court has not deviated in principle from this pattern. In essence it has expressed its fear of governmental power, and sought to protect the individual from its excesses,[80] taking care however not to repeat the empty formulas of nineteenth century liberalism by expressly stating their sensitivity to socio-economic problems.[81] In actual fact it has recently tended to lean in favour of fundamental rights.

a. The Supreme Court and Separation of Powers.

The Court has followed closely the theory of separation of powers. One can treat this theory in three different ways. The first is to trace power until one reaches a fountain source,[82] usually the legislature in its legislative or constituent capacity.[83] In this sense separation is a mere modus operandi. The second is to talk of three agencies of Government, each of varying strength, delimiting each other, working on a logic of polarity with one agency having the reserve power to resolve a crisis. The third is to recognise three separate powers - powers being traced not to a body but a principle or a Charter. Nehru believed that the Constitution embodied the first approach and that the Parliament was supreme.[84] But the Supreme Court seems to have rejected this and in Golak Nath v Punjab[85] attempted to take away from it its

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80. See infra Chapters III and IV.

81. As a casual reference see Fazl Ali J. in Gopalan v Madras A.I.R. 1950 S.C. 27 at pr.96 p.69 where he took a libertarian position but took care not to be associated with an "absolute liberty" position.

82. Kelsen's theory in his General theory of the law and state (1946).

83. See further Judge S.N.Dwivedi: Location of sovereignty in India (1967) 9 J.I.L.I. 71 at 84.

84. (1948) IX C.A.D. 1195-6.

85. A.I.R. 1967 S.C. 1643.

ultimate constituent power. The controversy carries on.[86] The Court appears to have followed the second and third approaches. In Ram Jawayya v Punjab (1955)[87] it ruled that the executive power exists independent of the legislative power and can always be exercised as long as fundamental rights are not upset. This view underwent some modification in M. P. v Bharat Singh (1967)[88] where it observed :

> "Every act done by the Government or its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority." 89

Despite the reference to Dicey and the stress on the importance of legislative power in the judgement, the existence of a separate legislature is recognised and this is not doubted by the presiding judge in extra-judicial comments,[90] nor its most trenchant critic.[91] All that happened was that the constitutional limitations imposed upon the executive were expanded from fundamental rights to "the prejudice of any person". More recently Ramaswami J. (who had as early as 1954 expressed sympathy for legislative supremacy[92]) made the following observation in Chief Settlement Commr. v Omprakash (1969)[93] :

> "(T)he authority to make the laws is vested in the Parliament and other law making bodies and whatever legislative power the

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86. The Parliament has passed the 24th and 25th Amendment Acts (1971) asserting its power to amend the Constitution. See comments G.V.Subha Rao (1972) I.S.C.J. Jnl. 1-9.

87. A.I.R. 1955 S.C. 549 at 556.

88. A.I.R. 1967 S.C. 1170.

89. Ibid at pr.5 p.1174.

90. K.Subha Rao: Some constitutional problems (1970) 61-2.

91. H.M.Seervai: The position of the judiciary under the Constitution of India. (1970) 95-6.

92. Parliamentary government in a planned economy (1953) II M.L.J. Jnl. 1.

93. (1969) I.S.C.J. 479.

> executive possess must be derived directly from the delegation of the legislature and exercised validly within the limits prescribed." 94

His lordship did not even make allowances for the exercise of normal administrative directions like, say, asking a peon to fetch a file. The statement is clearly obiter as the case had already been decided on the ground that the petitioner was not a displaced person and therefore not affected by the administrative orders. Further his lordship relied on Youngs Town Sheet & Tube Co. v Sawyer (1952)[95] - a case which involved amongst other things the President of the United States' exercise of his constitutional powers as Commander in Chief of the Army during the Korean crisis. It is submitted that Ramaswami J. has indulged in wide generalisations which do not break fresh ground.

This approach seems to have led to accepting the presence of three separate powers - the executive, the legislature and the judiciary (in relation to Part III) which exist independently of each other, posing problems of polarity between co-equals. To the extent to which all these are responsible to the judiciary (as protector of fundamental rights) rather than the legislature, the judiciary seems to have carved out for itself a somewhat wider role than was intended for it. But the Court has been subtle in its approach and has never tried to tell the other powers that it "holds the trumps".

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94. Ibid at 482

95. (1951) 343 U.S. 579.

b. The Supreme Court and the Executive

The Court has preserved the need for executive power, respected the need for official secrecy,[96] It has not made any plea for consultation and openness in the administration.[97] Conway v Rimmer[98] has been noticed in only one Madras case[99] and its principles enunciated in a Punjab case.[100] The Court has tried to restrict the liability of the Government,[101] although in a remarkable 1967 case it has done away with the Common Law presumption that a statute will not bind the State[102] and it has preserved the Common Law that Government debts shall have priority over any other.[103]

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96. See Sodhi Singh v Delhi Aministration A.I.R. 1961 S.C. 493 (the leading case on the subject); Union of India v Indra Deo A.I.R. 1964 S.C. 1158; Sub. Div. Officer v Srinivas A.I.R. 1966 S.C. 1164; Hussain Umar v Dalip Singh A.I.R. 1970 S.C. 47, which does not cite the earlier case law. The relevant statutory section is Section 123 of the Evidence Act 1872.

97. On the importance of this see the Fulton Report (Cmd 3638) I, pr. 277-280 p.91.

98. (1968) I All.E.R. 874 but see the later developments on this case at II All.E.R. 304.

99. Ram Srinivasan v Shanmughan A.I.R. 1969 Mad. 378. See infra p.566.

100. Narayan Deo v Punjab A.I.R. 1968 255 at pr. 28. All these cases are discussed in Chapter VII.

101. Kasturi Lal v U.P. A.I.R. 1965 S.C. 1039. For a recent illustration see R.K.Banjra: Liability of the State for negligence (1970) 12 J.I.L.I. 323 - a comment on Union v Segratai A.I.R. 1969 Bom. 13 where the Army was involved; So. Singh: Judicial interpretation of the State Immunity under the Constitution (1969) I An.W.Rep. Jnl. 19.

102. W.B. v Corpn of Calcutta A.I.R. 1967 S.C. 997 overruling Director etc. v Corpn of Calcutta A.I.R. 1960 S.C. 1355. For the background see G.P.Singh: Interpretation of the Statutes (1966) Chapter 8, pp337-8 written before this case was decided.

103. Builders' Supply Corpn. v Union A.I.R. 1965 S.C. 1061 foll. In an Income Tax matter in Somasundaram Mills v Union A.I.R. 1970 Mad. 190 at pr.6 p.192.

It has helped the Government whenever a constitutional imbroglio has arisen and its action has been challenged on technical grounds - as for example in the Budget crisis of Punjab[104] or when the States of Bombay (1960)[105] and Punjab[106] were being subdivided into smaller units.

The distrust of executive power has followed on the pattern of Dicey's rule of law formula.[107] The principles for construing delegated legislation were constructed in In Re Delhi Laws (1951).[108] The need for extensive delegation has been recognised and in the years that followed statutes like the Essential Commodities Act[109] have been liberally interpreted. More recently, a somewhat restrictive and uneasy policy has emerged, which has restricted the power to tax by delegated legislation.[110] The general attempt to judicialise the administrative process has been accepted. In this the lead has come from Wanchoo J. a Civil Service

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104. Punjab v Satya Pal A.I.R. 1969 S.C. 903.

105. Mangal Singh v Punjab A.I.R. 1967 S.C. 944, where the number of seats in the upper house of the State legislature fell below the constitutional minimum. The Supreme Court condoned this.

106. Babulal v Bombay A.I.R. 1960 S.C. 51, where the Supreme Court was willing to condone the fact that the requirements of their proviso of Article 3 of the Constitution were not strictly complied with (see pr.10 p.55-6).

107. For a brilliant attack on this see Seervai: The position of the Judiciary under the Constitution of India (1970) Chapter IV pp.78-102.

108. A.I.R. 1951 S.C. 332. Note Seervai's Constitutional Law of India (1967) pp 864-7 (where he argues that the Court's basic approach on the question is wrong and argues for more power being granted but on technical grounds viz. that R v Burah (1880) 3 A.C. 889 be followed.) See also the I.L.I. publication: Delegated legislation in India, (1966, N.M. Tripath Bombay).

109. The leading case on the Act is H.S.Bagla v M.P. A.I.R. 1954 S.C. 465. The Indian Law Institute has conducted a study entitled Administrative Processes under the Essential Commodity Act, (1966 N.M.H. Bombay).

110. The case of Vasan Lal v Bombay A.I.R. 1961 S.C. 4 allowed such taxation by a majority of 4:1; the majority was reduced to 3:2 in Corpn. of Calcutta v Liberty Cinema A.I.R. 1965 S.C. and reversed sub silentio in Devi Dassan v Punjab A.I.R. 1967 S.C. 1895. These are discussed by G.S.Ullal: Do judges live in an ivory tower ? A.I.R. 1968 Jnl. 37-40.

judge.[111] Ridge v Baldwin[112] has been specifically followed.[113] This has been extended also to areas of licensing which till recently had been held immune from the application of natural justice.[114] But apart from following English law, no independent broad principle of participation - the need for which has been emphasised in India's context[115] - has emerged. A Lokpal (Ombudsman) has not been established,[116] and the Supreme Court appears to be thinking in traditional separation of power terms, with the added nuance of accepting contemporary technical advances in British Courts.[117]

c. The Supreme Court and the Legislature.

The Court has tried to preserve the interests that the legislature wanted to safeguard and followed the constitutional doctrines of "the presumption of the validity of a statute" and the doctrine of severability to ensure that a statute will be presumed to be valid and if found wanting will be declared ultra vires only with respect to the offending severable portions.[118] The Court did, however, interpret the

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111. Note his judgements in Assam v Bharat Kala Bhandar A.I.R. 1967 S.C. 1768; P.L.Lakhanpal v Union A.I.R. 1967 S.C. 1567.

112. (1964) A.C. 40.

113. Sri Bhagwan v Ramchand A.I.R. 1967 S.C. 1767; Associated Cement Comp. v Sharma A.I.R. 1965 S.C. 1595 at 1601 and the cases cited supra f.n.111.

114. For a review of this development see S.N.Jain: Some recent developments in administrative law (1968) 10 J.I.L.I. 531 at 536 ff. See also the recent case of C.B.Bdg. & Ldg. v Mysore A.I.R. 1970 S.C. 2042 which followed A.K.Kraipak v Union A.I.R. 1970 S.C. 150.

115. Wilcox and Mukherjea: A constitutional balance (1967) 9 J.I.L.I. 275.

116. See (1971) 1 S.C.J.Jnl. 35-49.

117. For a general review of the Supreme Court's performance see M.A.Fazal: Judicial review of administrative action in India and Pakistan (1968).

118. See Imam: The Indian Supreme Court and the Constitution (1966) 128-136, 148-151; Seervai (1967) 61-65.

doctrine of eclipse against the legislature, as we shall see later.[119]

Despite this, of late an attempt has been made to attack both the legislature's supremacy as well as its internal system of privileges. In 1965 in an Advisory Opinion[120] the Court made it clear that though the legislature's privileges were those of the House of Commons (vide Article 194(3) of the Constitution) they were subject to fundamental rights, thus reversing an earlier decision[121] but leaving the legislature enough lee way to punish those who commit contempt in the face of the legislature. Critics have criticised the decision as a show of judicial power rather than a victory for fundamental rights.[122] While it is true that legislative privileges need tidying up, for they imperil the rights of a citizen, is it not preferable to follow the English approach evolved in a recent 1967 report to leave this to a body appointed by the legislature rather than the Courts ?[123] More recently, in Punjab v Satya Pal[124] the Court approved of the Governor of Punjab proroguing the Assembly to render the Speaker of the Assembly's adjournment order a nullity and thus validate the passing of the Finance Bill. They made it clear that a gubernatorial order under Article 209 of the Constitution was to prevail over the Assembly's rules of procedure.

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119. See Seervai (1967) 163-169.

120. A.I.R. 1965 S.C. 745.

121. M.S.N.Sharma v Sri Kishan Sharma A.I.R. 1959 S.C. 395.

122. See D.N.Banerjee: The Supreme Court and the conflict of jurisdiction between the legislative Assembly and the High Court of Uttar Pradesh (1966) See Also D.C.Jain: Judicial review of Parliamentary privileges - functional relationship of Courts and legislatures in India (1967) 10 J.I.L.I.205. Seervai (1967) 163-69; Setalvad: My Life (1970) 531-533.

123. See Report of the Select Committee on Parliamentary Privilege (1967) H.C. 34 on the procedural points suggested see particularly pr.177 p.45.

124. A.I.R. 1969 S.C. 903.

A far more serious attack on the legislature came in Golak Nath v Punjab[125] where they sought to prevent Parliament from amending Part III of the Constitution, and placing the sovereign power of the nation in the hands of a non-existent Constituent Assembly.

The triumph of the Courts over the legislature is best represented by the editorial comment in the Calcutta Weekly Notes, where foremost amongst the achievements of a judge was the fact that he had held the Chief Minister guilty of contempt of Court.[126] This attitude is also reflected in their attitude to the executive. In Re 143[127] they told the President, who had asked for their advice ex gratia, that they were not bound to comply with the request.[128] In Nanavati v Bombay[129] the Court told the Governor that she could not exercise her power of pardon while the matter was sub judice. The powerful dissent of Kapur J. and the comments of the critics of that decision are eloquent testimony to the fact that the decision forced an issue which could have been avoided.[130]

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125. A.I.R. 1967 S.C. 1643.

126. (1968) 72 C.W.N. 1. Note the casual remark "Mr. Justice Banerjee also found a Chief Minister guilty of contempt."

127. A.I.R. 1965 S.C. 745 at pr.15 p.755-6 on the intervener see pr. 63-5, 768-69.

128. Z.Khan J. had done this in a powerful dissent in the Federal Court in In Re Ref. under S.213, Govt. of India Act, A.I.R. 1944, F.C. 73 from p.79. But he gave reasons for not advising the executive in a long paged judgement, and did not after that like the Supreme Court give the advice that he had thought it improper to give.

129. Nanavati v Bombay A.I.R. 1960 S.C. 112.

130. Seervai (1967) 785-800. Note his argument at 798 that there was not in fact any conflict between the executive power of pardon and judicial control of sentences. His view that this case had been impliedly overruled by Sarat Chandra Rabha v Khagendranath A.I.R. 1961 S.C. 334 is a little far fetched, because the ratio of the latter decision which asserts that the power of remission exercised by the executive is different from a judicial exercise of power, must be confined to the interpretation of Section 7(b) of the Representation of People Act 1951.

The Supreme Court has been very careful to safeguard the independence of the judiciary in India. In Chandra Mohan v U. P.[131] extending its protection to the lower judiciary it ruled that a High Court must be consulted when District Judges are appointed. In an earlier case - Assam v Ranga Mohd.[132] - it ruled further that the power to appoint a Registrar belongs solely to the Chief Justice.[133] In Orissa v Sudhansu Mishra[134] it opined that the extent to which a judicial officer can be lent to the State for executive or quasi judicial duties was a matter for the High Court to decide, though it was said obiter that the State's requirements must be borne in mind. Hegde J. observed :

> "Just as the High Court resents any interference in the functioning of the judiciary, the executive has the right to ask the High Court not to interfere with its functions." 135

In W. B. Nripendra Bagchi[136] it held that the High Court alone can hold disciplinary proceedings against a District Judge.

It has therefore tried to interpret separation of powers to preserve their independence from the executive.

Having acquired this position of status, they have been a little touchy about criticism and evolved (as we shall see later[137]) a

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131. A.I.R. 1967 S.C. 1987.

132. A.I.R. 1967 S.C. 903.

133. Ibid at pr.11 p.650.

134. A.I.R. 1967 S.C. 647

135. Ibid at pr.13 p.652.

136. A.I.R. 1966 S.C. 447.

137. This is examined in some detail in Chapter VII. As examples see: R.C.Cooper v Union A.I.R. 1970 S.C. 1318 (where they issued papers for contempt against those involved in a public meeting to criticise their judgement in R.C.Cooper v Union A.I.R. 1970 S.C. 564). See also E.M.S. Namboodripad v Kerala A.I.R. 1970 S.C. 2015 (an aspect of which has been discussed above).

strict law of contempt to preserve it not only from criticism that "scandalizes" their work, but also criticism which attempts to question their status. This may partly have been the product of a legislative crusade against the judiciary.[138]

In interpreting statutes the Court has followed the rule that the jurisdiction of the Courts shall not be ousted[139] unless it is explicitly taken away or clearly implied[140] by statute. In such cases it has extended its power of review to cases where the decree was a nullity[141] and insisted on assuming fairly wide powers necessary to the exercise of its jurisdiction.[142] Its interpretation of its own jurisdiction - as we shall see later - has been very wide and not being able to cope with the bulk of litigation that finds its way before them, they are now trying to limit the use of their discretion as much as possible.[143]

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138. See below Chapter III. The judiciary was attacked right from the start. See Nehru: (1949) IX CAD 1195-6.

139. For the general approach of the Court see G.P.Singh: Principles of statutory interpretation (1966) Chapter 9, pp 357-390. The general principles that the Court intends to follow have been summarised by Hidayatullah J. in Dhulabhai v Gujerat A.I.R. 1969 S.C. 78 at pr.32, pp 89-90. For a good illustration see Musamia v Rabari Govindbhai A.I.R. 1969 S.C. 439 at pr.7 p.446.

140. See Desika Charulu v A.P. A.I.R. 1965 S.C. 806; Abdul v Bhawani A.I.R. 1966 S.C. 1718 at pr.9 p.1719; Ram Sarup v Chand A.I.R. 1966 S.C. 983 at pr.15-18 pp.897-8. It has laid down the rule that privative clauses will be construed strictly. See the recent cases of I.T.O. v Mohd. Kunhi A.I.R. 1969 S.C. 430 quoting Maxwell: Interpretation of statutes (11d) p.350 at pr.4 p.433; S.P.O. Faizabad v S.N.Singh A.I.R. 1970 S.C. 140 at pr.8 p.142.

141. See Ram Sarup v Shikar Chand A.I.R. 1966 S.C. 893 at pr.15-18 pp.897-8.

142. W.B. v I & S Co. A.I.R. 1970 S.C. 1298 at pr.9 pp.1301-2.

143. This is dealt with in considerable detail later, Chapter II, Section 6.

The Court has therefore safeguarded its position from outside criticism, from the legislature, and from executive interference. At the same time it has undermined their powers and asserted its right to review their actions. It appears to have exceeded the role that the Constituent Assembly intended for it.[144]

d. The Federal Structure

Indian federalism as embodied in the bare text of the Constitution is quite different from any other in as much as the distribution of power between the Centre and the States is heavily weighted in the former's favour. So much so that India has been described as a "quasi federal state ...".[145] All the residuary power, some of which the Centre can exercise suo motu[146] and some at the request of the State legislature or the Rajya Sabha[147] can easily turn India into a unitary State. There are also provisions which enable the Centre to violate

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144. See generally Chapters III and IV infra.

145. On the federal structure see R.Dhavan: India as a federal State (1967) I Allahabad Univ.Law Jnl. arguing that India was not quasi-federal because of the concentration of power in the Centre but because of Art.3 which makes the territorial integrity of the State vulnerable. See also K.Santhanam in M.G.Gupta (Ed) Aspects of the Indian Constitution (1965, Allahabad). Mrs. R.Coondoo: The division of powers in the Indian Constitution (1964 Calcutta) where she refutes the charge of overcentralisation. The Indian position is best summed up by G.N.Joshi: Aspects of Indian Constitutional Law (1964) see Chapter IV pp 136-162. Note the following comments at p.24 : "When one carefully examines the features and characteristics of Indian federalism, which is moulded by the accumulated experience of other federations and which is devised in India's historical setting to solve the problems of a modern state, one feels that Indian federalism is a contribution to the theory and practice of federalism." An opinion affirmed by Prof.A.W.McMahon: Federalism - mature and emergent (1955) 16. See further B.Bharadwaj: Recent developments in Indian federalism (1967) 1 S.C.J. Jnl. 97.

146. Art. 248.

147. Art. 249 and 253.

the territorial integrity of the Constituent States.[148] The Court has interpreted this provision in the Centre's favour.[149]

The Supreme Court's contribution to the federal structure has not been significant and can be traced elsewhere. It has merely followed the usual doctrines about pith and substance not always in the Centre's favour.[150] It did however in a famous case[151] prevent a State from taxing inter-state sales, necessitating a constitutional amendment.[152] An attempt was also made to reduce the State's power to tax goods while interpreting the "Freedom of Commerce" provisions of the Constitution under pressure from Australian precedent but the Court has itself worked out some balance in that area.[153] There have been only two cases in which there was a direct conflict between the Centre and the States, in the first the Court accepted (though not without dissent) the predominance of State power and in the second it preferred not to exercise jurisdiction, deciding the point on a preliminary issue without going into the merits of the matter.[154]

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148. See Article III and G.N.Joshi: (supra f.n.145 12-14).

149. See Babulal v Bombay A.I.R. 1960 S.C. 51 where the Court suggests that the assent of the State legislature need not be elicited to the final plan evolved aftertheir opinion has been taken once (see pr.10 pp.55-6) Mangal Singh v Punjab A.I.R. 1967 S.C. 944 where the number of seats in the lower house of the Haryana legislature were allowed to fall below the constitutional minimum.

150. See Seervai: (1967) Chapter XXII pp.898-970.

151. Bengal Immunity Co. v Bihar A.I.R. 1955 S.C. 661.

152. The Sixth Amendment Act 1956.

153. Atiabari Tea Estate Co. v Assam A.I.R. 1961 S.C. 232; redressed in Rajasthan v Automobile Transport Co. A.I.R. 1962 S.C. 1406. See Imam (supra) 190-200; Seervai (1967) Chapter XXIV pp.989-1006. The influence of Australian case law is analysed later in the thesis in Chapter VII.

154. W.B. v Union A.I.R. 1963 S.C. 1241. Note the dissent of Subba Rao J who takes the State's point of view; Bihar v Union A.I.R. 1970 S.C. 1446.

To sum up, while balancing constitutional interests, it has taken away from the legislature its claim to supremacy; insisted on exercising a suprevisory jurisdiction over every action of officialdom not sparing even Parliamentary privilege, and the executive power to pardon. It has championed fundamental rights as a means to achieve this supervisory power, but not always interpreted them with a bias against the Government. Within this broad framework it has respected legislative and executive and federal and state claims to power. In constitutional terms it has substituted a comprehensive theory of judicial review for the basic theory on which the Constitution was founded, namely, a theory of parliamentary democracy resting on the principle of responsibility to a supreme legislature.

3. Directive Principles: An Indian approach to the problem of Constitutional Law.

Constitutional interpretation tends to follow the golden rule of statutory interpretation that words must be interpreted literally.[155] More recently an Indian constitutional lawyer in Belfast while examining the Supreme Court on property rights has made the plea :

> "What is needed is a new approach ... to constitutional interpretation, which will permit the Court to interpret property provisions in the context of Indian conditions and in the light of and guidance afforded by the economic objectives of the Constitution contained in the Preamble and the Directive Principles of State Policy." 156

The Directive Principles provide a new approach to the problem of constitutional interpretation substituting new principles, some of which are

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155. See Craies: Statute Law (1971) 4th Edn.507-512; Seervai (1967) Preface v; Wynes: Legislative, Executive and Judicial Powers in Australia (1970) 4th Edn. Chapter II pp.8-28 particularly at p.8.

156. Jagat Narain: The Indian Supreme Court and property rights and the economic objectives of the Constitution (1968) III Journal of Law and Economic Development 147 at 180; see also his comments in Equal Protection Guarantee and the Right to Property under the Indian Constitution 15 I.C.L.Q. 199 at 206-7 and the comments of U.Baxi: IX J.I.L.I. 323 at 362 f.n.110.

mere statements of intent,[157] some merely declaratory of the present law,[158] some the product of American socio-economic interpretations of their Constitution adapted to Indian conditions[159] and some peculiar to Indian conditions.[160] This classification does not differ from other classifications, but it is submitted that the classification of these principles into legal and non-legal does not serve any useful purpose as all these articles can have a bearing on the interpretation of statutes and the Constitution.[161]

Of the words in Article 37 that the Directive Principles shall be regarded as "fundamental in the governance of the country," one writer has said :

> "(They) ... describe in rhetorical language, hopes, ideals, and goals rather than the actual reality of government. The principal object in enacting the Directive Principles appears to have been to set standards of achievement before the legislature and executive, local and other authorities, by which their success or failure can be judged." 162

This approach, which can be traced back to one foreign observer,[163] has gained wider circulation in as much as commentators

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157. Articles 38, 43, 45, 47, 49 and 50.

158. Article 51.

159. Articles 40, 44, 46, 48, e.g. Article 48 (cow slaughter).

160. Articles 39, 41, 43 (on which in the context of labour law see Dhavan J. in Balwant Raj v Union A.I.R. 1968 All. 14 and comments of U.Baxi (1969) XI J.I.L.I. 245 at 260-1), 44, 46, 47, 49, and 50.

161. For other classifications and the allegation that some principles are not legal see G.S.Sharma: Directive Principles of State Policy (1965) 7 J.I.L.I. 173; U.Baxi: Directive Principles of State Policy (1969) 11 J.I.L.I. 245-269; Michael Coper: Definition of Law and the Directive Principles of the Indian Constitution (1969) 9 Jaipur Law Journal 1.

162. Seervai (1967) 759.

163. Jennings: The draft Constitution Nov.11,1948 - The Hindu; Ibid, Some Characteristics of the Indian Constitution (1953) 30-1; but note the comments of K.Markandam: Directive Principles in the Indian Constitution (1960) 314.

have tended to regard them as non-legal socio-economic declarations.[164]

But more recently a judge of the Supreme Court (taking a more definitive stand than his brother judges[165] have taken in the past) has declared in his B. N. Rau Lectures that the Directive Principles are another way of interpreting the Constitution and are not to be neglected[166] - an opinion politicians have been trying, for their own reasons, to put forward for a long time.[167]

Are these principles legal principles ? The Constituent Assembly did finally agree that these principles were of great socio-economic importance,[168] but there seems to have been little emphasis on

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164. G.N.Joshi: The Constitution of India (1961, Macmillan, London) 121-128 (at 121)."It is not clear how far these principles or injuctions are to be kept in mind by the judiciary in the interpretation of legislation" but see contra at 127-128. B.M.Sharma: The Constitution of India (1966, APH, London) 192-198 particularly pp 197-8 treats Directive Principles as if they are addressed to the executive and legislatures. M.D.Widwans: Nature of the Directive Principles A.I.R. 1956 Jnl. 37-42; P.B.Mukharji: Aspirations of the Indian Constitution A.I.R. 1955 Jnl. 101 at 102 col.2 ff R.K.Sircar: The Constitution of India - its salient features (1950) 48 Allahabad L.R. 127 at 131; Gobind Das: Justice in India (1967) 67-9; P.K.Ghosh: The Constitution of India (1966 Calcutta) 118-9; Note the comment of K.C.Wheare: India's new Constitution analysed (1950) 52 Bom.L.R. Jnl. 25-7 48 Allahabad L.J. 21-2 "If these declarations of liberal principles, strange as they may seem to British eyes, help the Constitution on its way and assist the people in working their government, they are more than justified."

165. K.Subba Rao: Our Constitutional problems (1970) 3, 5-6, contrast 18-20, 27-8 and observe the plea for harmonious interpretation at 67. P.B.Gajendragadkar: The Constitution of India (1969) 12-22. For the limited approval of the lawyer who argued most of the cases that are now cited as precedent on this question see Setalvad: The Constitution of India (1967) 31-33.

166. K.S.Hegde: Directive Principles of State Policy (1971) 1 S.C.J. Jnl. 50 ff.

167. Nehru in the debate on the First Amendment Bill (1951) L.S.D. May 16,1951, col.8820; M.S.Gurupadaswamy: on Fourth Amendment Bill (1954) March 15,1955 quoted Markandam (supra f.n.163) 148-9.

168. There were three discussions by the Assembly on these principles. A preliminary discussion on their justiciability in Courts of law at III C.A.D. 390 f; a minor debate at V.C.A.D. 333 ff; the main debate which lasted from Nov.19-25,1948 at VII C.A.D.470 ff. These are very accurately summed up by K.Markandam (supra f.n.163) Chapter III, 88-122; G.Austin's account (The Indian Constitution - 1966) is a little suspect from a lawyer's point of view.

its legal nature and it was asserted that they were vague. One member called them "a veritable dust-bin of sentiment"[169] - a comment made much of in a recent article.[170] So disillusioned is the lawyer with the idea of Directive Principles as legal aids that an authoritative work does not even consider them worthy of discussion.[171] The Supreme Court has had to give them a meaning and relevance in a legal context.

The Supreme Court has interpreted the Directive Principles in 20 cases[172] including one Advisory Opinion. It has evolved the following rules :

1. The Directives are not a source of legislative power for either the Centre or the States.[173]

2. If the Directives conflict with fundamental rights or any other

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169. T.T.Krishnamachavi VII C.A.D. 583 (on Nov.24,1948 - the second day of the debate).

170. U. Baxi: (1969) 11 J.I.L.I. 245.

171. Mohammad Imam: The Supreme Court and the Indian Constitution (1968).

172. Madras v Champakam Doraijan (1951) S.C.R. 525 (Article 46); Bihar v Kameshwar Singh A.I.R. 1952 S.C. 252 (acquisition of property); Bombay v Balsara A.I.R. 1951 S.C. 318 (Articles 37 and 47); Coverjee v Excise Commissioner A.I.R. 1954 S.C. 220 (Article 47); Subodh Gopal v W.B. A.I.R. 1954 S.C. 92 (acquisition of property); Bijoy Cotton Mills v Ajmer A.I.R. 1955 S.C. 333; M/S Crown Aluminium Works v Workmen (1958) S.C.R. 651 (both concerned with Articles 39 and 47); Express Newspapers v Union A.I.R. 1958 S.C. 578 (Articles 39 and 43); M.H.Qureshi v Bihar A.I.R. 1958 S.C. 731 (Cow slaughter Article 48); Re Kerala Education Bill A.I.R. 1958 S.C. 956 (Article 45); Deep Chand v U.P. A.I.R. 1959 S.C. 648 (at pr.26 p.663-4 stating that Directive Principles do not authorise legislative powers); Atma Ram v Punjab (agrarian reform); Abdul Hakim v Bihar A.I.R. 1961 S.C. 448 (Article 48); Orient Weaving Mills v Union A.I.R. 1963 S.C. 98 (Article 43); Devi Das v Union A.I.R. 1964 S.C. 179 (Article 46); All India Reserve Bank Employees v Reserve Bank of India A.I.R. 1966 S.C. 305 (Article 43); Golak Nath v Punjab A.I.R. 1967 S.C. 1643 (on the general importance of the Directives to determine the scope of Part III); Hindustan Antibiotics v Workmen A.I.R. 1967 S.C. 948 (Article 39 and 43); Chandra Bhavan Bdg. & Ldg. v Mysore (1970) II S.C.R. 600 (Articles 38-9); Asst.Commr. v B & C Co. A.I.R. 1970 S.C. 169 (the Directives do not grant legislative power).

173. Deep Chand v U.P. (supra f.n.172); Asst.Commr. v B & C Co. (supra f.n.172).

part of the Constitution, the latter shall prevail over the Directives.[174]

3. These principles are however useful to determine the usefulness of an action under Article 19(2)-(6) of the Constitution.[175]

4. In socio-economic matters, e.g. where questions like labour law are involved - the Directives shall play a general role to meet the needs of the instant case.[176]

The above stated rules are very general, and the Supreme Court does not at any stage tell the weight that judges are meant to attach to the Directives. Judges have been imprecisely selective, and have relied on other techniques to register their point of view in a case. Thus in Champakan Doraijan v Madras[177] we find Das J. emphasising the subsidiary nature of the principles; but as we shall see later, he more than any other judge in the early Court, did more to further the cause of socio-economic reform. Again in Kameshwar v Bihar[178] we find Mahajan J. praising the Directives even though in that case and in other cases he

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174. Das J. in Champakan Doiraijan v Madras (supra f.n.172 - the leading case on the subject); M.H.Qureshi v Bihar (supra f.n.172); Re Kerala Education Bill (supra f.n.172).

175. Bombay v Balsara; Coverjee v Excise Commr; Express Newspapers v Union; Golak Nath v Punjab; Chandra Bhavan etc. v Mysore: (all cited supra f.n.172). Note: Justice Hegde's comments at (1971) I S.C.J.Jnl 50 at 70-1.

176. Bijoy Cotton Mills v Ajmer; M/S Aluminium Works v Workmen; Express Newspapers v Union; Orient Wvg.Mills v Union; All India Reserve Bank Employees v Reserve Bank of India; Hindustan Antibiotics v Workmen; (all these are cited at f.n.172).

177. (1951) S.C.R. 525; see also M.H.Qureshi v Bihar A.I.R. 1958 S.C. 731; note that Hegde (cited supra) at68-71 seems to misunderstand Das J.'s approach altogether. Das J. was just trying to prevent the Court from being browbeaten by counsel into declaring the supremacy of the Directives.

178. Kameshwar v Bihar A.I.R. 1952 S.C. 252. Note the criticism of this case, from the point of view of Directive Principles, in P.K.Tripatti (cited f.n.190 infra) at 34-36.

showed a marked preference for fundamental rights when pitted against socio-economic arguments. In fact the Directives have not really been treated as principles but rather as standards that one must bear in mind.

At this point a distinction must be made between :

> "rules, principles, precepts, defining conceptions and precepts establishing standards." 179

For law, as the severest critic of Hart's Concept of Law[180] makes clear, is not just a system of rules.[181] It consists of several principles, precepts and standards, which are of varying importance and help, more than anything else, to determine the growth of law. As an illustration of how a principle can often override a rule of law, we have only to look at the importance of the doctrine of mens rea in Criminal law.[182] Precepts also play an important role. Concepts like "possession" have played an important part in both civil and criminal law.[183] Later we shall analyse the importance of the concept of property and the extent to which it has played a role in determining the scope of Article 19(1)(f) of the Constitution.

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179. A distinction first made by Roscoe Pound; see (1959) III Jurisprudence 124-32.

180. Hart in his Concept of Law (1961) talks of a system of rules divided into primary rules which describe rights and liabilities and secondary rules or recognition, change and adjudication. Certainly precepts and principles and standards are part of the secondary rules but they do not emerge as strong factors in Hart's evaluation of the judicial process.

181. Dworkin: in Sumner (Ed) Essays in the Philosophy of Law (1963); The model of rules (1969) 39 Univ.ofChic.Law Rev. 19; for a defence of Hart see G.Christie: The model of principles (1969) Duke Law Journal. 649 U.Baxi: (1969) 11 J.I.L.I. 245 does try to introduce this controversy into this area of Directive Principles but he does not pursue it seriously.

182. See for example Smith & Hogan: Criminal law (1969) 59-69; Hogan: Criminal liability without fault (1969) Leeds University Press published as a separate lecture. Now to be read in the light of the following "drug" cases: Sweet v Parsley (1969) 2 W.L.R. 470; Fernandes (1970) Cr.L.R. 277; Irving (1970) Cr.L.R. 942.

183. See generally Salmond: Jurisprudence (1968 12d) 265-297; Keeton: Elementary Principles of Jurisprudence (1949) 180-194; Paton: Jurisprudence (1964 3d); see particularly cases 510-522. For a juristic approach see Pound: V Jurisprudence (1959) 77-117. For a good recent application in the area of Criminal law see Warner v Metropolitan Commr.(1968) II All E.R. 356 and later developments in Fernandez (1970) Cr.L.R.277; Irving (ibid)942.

The Indian Supreme Court has merely treated the Directives as precepts establishing standards, rather than principles of interpretation. This contrasts with the Canadian approach to their Bill of Rights (which resemble the Directives much more than they do fundamental rights) in R. V. Drybones (1969)[184] where a statute was found wanting because it offended the Equality principle of the Bill of Rights. It is by no means suggested that the doctrine of Constitutional limitations should be extended to the Directives. What is important is that they be treated as principles of law, which help to determine the width and scope of the rules in the instant case.

As a concrete example, let us go back to our example of whether a "chose of action" can be acquired or not. The Supreme Court applied this American doctrine to India, in cases which involved agrarian reform[185] and the creation of a labour welfare fund.[186] If the Directives [Articles 36-39] had been treated as principles in any meaningful sense a different result would have accrued. The principle that the Court did in fact apply was the doctrine of eminent domain. Again, in another case,[187] Hidayatullah J. in dissent opined that the acquisition of land for the purpose of furthering village community life was an acquisition for which compensation would have to be paid. Did this have something to do with his extrajudicial

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184. (1969) 9 D.L.R. (3d) 473 and note the comments in Annual Survey of Commonwealth law (1970) 16-17, 88-90; F.M.Auburn (1970) 86 L.Q.R. 306; (1970) P.L. 213.

185. This is discussed supra in the section entitled "Neutrality Principles." The case is Kameshwar v Bihar A.I.R. 1952 S.C. 252. Ranojirao v Mysore A.I.R. 1968 1053 was also concerned with agrarian reforms.

186. Bombay Dyg. and Mfn. Co. v Bombay A.I.R. 1958 S.C. 328.

187. Ajit Singh v Punjab A.I.R. 1967 S.C. 856; Bhagat Singh v Punjab A.I.R. 1967 S.C. 927.

distrust of such bodies ?[188] And, if so, was it not in defiance of the principles of village community life laid down in the provisions of Article 43 ? We shall later see that in many areas where the law of property was discussed by the Supreme Court, foreign precepts much more than the Directive Principles played a much more important role.

The extent to which the Directive Principles can be used in interpretation can perhaps be illustrated by the notable attempt of a High Court judge to extend them to non-constitutional matters. He upheld an award made by an Industrial Tribunal which had leaned in the workers' favour, because of the constitutional concept of a living wage.[189] This shows that the argument that the Directives establish standards for politicians is not wholly tenable. It is true that a concept of a living wage is not feasible in the present Indian context but it is the principle that counts. No one has ever seriously argued that the doctrine of "mens rea" in criminal law should be consistently applied without exception.

In broad terms the Directives could, if properly interpreted, induce the following principles in Indian Constitutional law.[190]

Firstly, Courts would have to recognise in principle the need for tremendous State legislative activity in the areas which the Directives cover. This does not mean, and the Supreme Court has made this clear,[191] that the Directives will be a source of legislative power, but

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188. Note the comment that he makes in Democracy and the judicial process in India (1968) at p.38 "If only political parties would leave these bodies (the panchayats) ... alone or if village elections were abolished, and if ... control over land tenures and ownership were not made over to them in the beginning, the panchayats would function well."(emphasis mine).

189. Dhavan J. in the case Balwant Raj v Union A.I.R. 1968 All 14. Note the appreciative comments of U.Baxi: (1969) 11 J.I.L.I. 245 at 260-1.

190. Similar suggestions are made in P.K.Tripatti: Directive Principles of State Policy: The Lawyers' approach to them hitherto parochial, injurious and unconstitutional (1954) XVII S.C.J. 7-36.

191. See supra f.n.173.

it does mean that a wider principle than the principle that the Court will presume the constitutionality of an enactment is required. In a sense this new approach is now enshrined in the new 25th Constitutional Amendment to the Constitution, where the rather extreme step of not applying Part III to statutes embodying the Directives has been taken.[192]

Secondly, the Directives would induce a major change in the areas of administrative law, by granting more power to the Government and its officers so that it may have the concomittant power to make the Directives effective. This might also mean to give them a power to tax for schemes which affect corporate life, and make a distinction between a tax and a fee instead of construing the latter like the former.[193] Courts should be concerned with procedural and jurisdictional ultra vires rather than reasonability of exercise.

Thirdly, both the Directives as well as the Chapter on fundamental rights contain the provisions which call for protective discrimination and which try to preserve various details of Indian life[194] which may

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192. The 25th Amendment Act introduces Article 31 C into the Constitution which reads: "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes or abridges any of the rights conferred by Article 14, Article 19 or 31; and no law containing a declaration that it is for giving effect to such policy shall be called into question by in any Court on the ground that it does not give effect to such policy; provided that where such law is made by the legislature of a State, the provisions of this article shall not apply the veto unless such law having been reserved for the consideration of the President, has received his assent." See on this G.C.Venkata Subbarao: Property Rights and the 25th Amendment (1972) I S.C.J. Jnl. 1-9; V.G.Ramchandran: People of the Indian Nation v The Judiciary and Parliament (1972) I S.C.J.Jnl 9-14.

193. In Commr. of H.R.E. v L.T.Swamiar A.I.R. 1954 S.C. 282; Automobile Transport Co. v Bihar A.I.R. 1962 S.C. The first case in which this was done was Mohd. Yasin v Town Area Committee Jalalabad A.I.R. 1952 S.C.115 (per S.R.Das J.) at pr.7 p.117.

194. These are all discussed in Chapter VI. The Constitution sanctions (protective discrimination (Articles 15(3);15(4);16(4))and preserves the right of the minorities to maintain their own language and institutions (Article 29-30). These are all discussed in Chapter VI along with the Supreme Court's attitude to freedom of religion.

militate against the principle of equality. We will examine the Supreme Court's performance in this area later, but it will suffice for the present to say that the egalitarian principles must be modified so that these curious oddities can be preserved. The Court sometimes forgets that the Constitution protects and encourages verisimilitude, and does not proclaim a synthetic para-secular approach to corporate life.

Fourthly, in every case where the Directives can be brought into play, the particular Article in question must be treated as a fundamental principle on which the case would stand or fall, rather than a subordinate principle subservient to the rest of the Constitution and merely a point for casual reference. This will make more explicit and clear the approach that the Court takes to the Constitution. Gradually these will assume the status of being principles of law binding on all Courts in India.[195]

Fifthly, Articles 19 1(f) and (g) contain the Common Law theory of freedom of contract which the Court has followed. That has to be modified in the context of the Directive principles.

So far all that the Supreme Court has done - and Justice Hegde's article makes this clear - is to state that the Directives are important and when faced with a problem where the personal discretion of the judges needs to be guided, they will refer to the Directives amongst other things. A much wider and more legal approach to the challenge that the Directives offer is called for and necessary.

4. Conclusion

What is the Supreme Court's contribution to the principles of Constitutional interpretation ?

We have seen that it has been non-neutral in its approach to the Constitution, interpreted the traditional theory of separation of

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195. For the extent to which this has already been done, see an article-by-article analysis in V.N.Shukla: The Constitution of India (1970;5th.) 177-188; Seervai (1967) 759 ff.

powers so as to make themselves umpires on every exercise of power within the country. It has reinforced the already strong federal bias in the Constitution and in certain areas followed foreign precedent to deprive States of their right to tax goods within their boundaries.

The Directives contain a new approach to constitutional interpretation, in as much as they call for a reassessment of the accepted constitutional principles of: delegation of power, the concept of equality and freedom of contract. The Court has not made any effort to reassess these principles and apply them to an Indian context.[196] In a sense a leading critic's view that "the shadow of Dicey" has prevailed[197] appears to be right. The Supreme Court must realise that the Courts are concerned with matters of jurisdiction procedure and malafides, not with problems where they sit and review the decisions of those who are entitled to make them. It is natural that jurisdictional questions are themselves bound up in wider issues. The Court must adjust its approach to these problems so as to make more possible the exercise of power rather than restrict it. As a High Court judge puts it :

> "Courts, which within strict limits have to essay social engineering, are not the sanctuary of age old but unwholesome (approaches) ... even if they are not the refuge of social reformers. In the inevitable chemistry of social change, Courts are certainly not anti-catalysts." 198

More recently an ex-Chief Justice of India[199] has admitted that the Supreme Court's interpretation of the Constitution had forced the Government to resort too frequently to Parliament's power to amend the Constitution. This self-admission is proof in itself of the Court's adherence to traditional patterns of interpretation.

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196. These are discussed at their appropriate places below.

197. Seervai: The position of the judiciary under the Constitution of India (1970) Chapter V.

198. V.K.Krishna Iyer J. in Kunhu Mohd v T.R.Umanayathi (1969) K.L.R. 629 (The report is not available at SOAS) quoted by Derrett: C.M.H.L. (1970) 397 f.n.2.

199. Gajendragadkar: Indian Parliament and Fundamental Rights (1971) Tagore Law Lectures as reported in National Herald Feb.23, 1972, Feb. 26,1972.

4. The Supreme Court, the Formula of Justice, Equity and Good Conscience and the use of English Law.

Many legal historians have argued that the "Justice, Equity and Good Conscience" formula (hereafter J.E.G.C.) was used to introduce English Law into India.[1] This thesis has been contested by an English writer, who points out that the intention was quite contrary :

> "It (the formula J.E.G.C.) was introduced in India by the East India Company under the influence of the theory that civil law was suitable to the Company's Courts in the Presidency since the Common Law was not suitable to the conditions of the settlements there." 2

It is by no means suggested that English law did not play an important role or that

> "between 1772 and 1840 numerous rules of personal law were ~~not~~ refused application on the ground that they were unenforceable for various reasons including natural justice, but this process is poorly documented and the personal laws became virtually settled by the middle of the century." 3

It is wrong to begin with the assumption that judges went headlong into the rules of English law without looking for alternatives, for the Regulations lay down quite clearly that the formula was only residual in nature and should be applied only where the fund of local law was exhausted.[4] In fact Gajendragadkar J. in Murari Lal v Devkaran[5] has

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1. See M.C.Setalvad: Common Law of India (1960) pp.53-60; 68-9; The role of English in India (1966) Chapter I generally; M.P.Jain: Outlines of Indian History (2d) 576-598; J.K.Mittal: Indian Legal History (1963) 252-256. For a general review on the reception of English law into India and else where see: K.W.Patchett: English law in the West Indies (1963) 12 I.C.L.Q. 922; The XIVth Report of the Indian Law Commission 677-694; Lipstein: The reception of western law in India (1957) UNESCO Int.Soc.Sci.Bull.85.

2. Prof.J.D.M.Derrett: Justice, Equity and Good Conscience in India (1962) 64 Bom.L.R. Jnl. 129, 145.

3. Ibid at p.130 f.n.5.

4. Regulation III Section 21 (1793 Bengal); Regulation II Section II (1802, Madras); Regulation IV (1827,Bombay); Section 26, Bengal Civil Courts Act, 1887; Section 31, Madras Civil Courts Act 1873. The best examples of this remain in those pointed out by Derrett i.e. Ram Coomar Condoo v Chunder Coondoo (1876) 4 I.A. 23 at 50-1; Bai Dahi v Bai Sada A.I.R. 1961 Gujerat 105 at 109 col.1.

5. A.I.R. 1965 S.C. 225 at 228-9.

demonstrated that the Privy Council went out of its way not to enforce the English law. The Courts always made it a point to apply the statute if it was clear[6] and, except in the Punjab,[7] never refused to apply the local law on the grounds that it violated J.E.G.C. unless there was a clear conflict in the personal laws.[8] Nor was the English law the only one to be consulted. Attempts to look at other laws were also made. The most notable examples are Sir Ashutosh Mukherjea's research on the status of the posthumous son in Kusum Kumari v Dasrathi,[9] Hidayatullah J.'s judgement in Kantilal v Balkrishna[10] on the problem of death by negligence and Gajendragadkar J.'s research into Hindu law on the clog on the equity of redemption.[11] More recently the absorption of Goa and the French possessions into India has led to the application of Portuguese

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6. See Derrett's examples notably Chandarvarkar J. refusing to romanise the Hindu law in Kaligovada v Somappa (1909) 33 Bombay 699. For an example of where there was a conflict of Hindu law texts see Rakhalraj Mondal v Debendranath A.I.R. 1948 Cal. 356 at 358 col.1; and on Mohommedan law see Aziz Bano v Muhammad Ibrahim Hussain (1925) 47 All. 823 at 837.

7. See Punjab Laws Act (IV of) 1872 Sections 5 - 6.

8. There were other cases where customs were in fact declared to be not in consonance with J.E.C.G., see for example Holloway J.'s view on the Islamic law of preemption in Ibrahim Sahib v Muni Mir (1870) 6 M.H.C.R. 26; Collector of Masulipatnam v Cavaly Venkata (1860) 8 M.I.A. 500 and the discussion on this by Jain (supra f.n.1. p. 582). See also Mayne: Hindu law and usage (11d) 80-81 citing case law. For cases on the refusal to follow foreign law see f.n.6.

9. A.I.R. 1921 Calcutta 487.

10. (1950) Nagpur 239. Note the reference to English, French, Germanic, Islamic and Roman law at 268-276; but note the dissent of Mudholkar J. who tries to find a fair solution to the problem even though he believes at p.304 that "the Common Law modified by statute should be the ghiding factor". The majority overruled the case of Rakmabai v Dhanraj A.I.R. 1921 Nag. 102.

11. A.I.R. 1965 S.C. 225 (This case is discussed in detail later).

and French in these particular areas. This law has recently been reviewed in a recent American journal.[12]

In our present context the application of the J.E.G.C. formula is not important, because the situations in which it could apply are fast decreasing with increasing codification. We will examine firstly the fate the formula has suffered at the hands of the Supreme Court in the three cases in which it has discussed it, and secondly briefly examine the general attitude of Courts in India to English law as an aid to constructing statutes based on English models or framed in an English or anglo-American style.

a. The Supreme Court and the Formula

The first case in which the Supreme Court discussed J.E.G.C. was Namdeo v Narmada Bai[13] in which the question was whether the formula could be used to introduce the principle behind Section 111(g) of the Transfer of Property Act 1882 to a lease executed before the passing of the Act. Mahajan J. (for S. R. Das J. and himself) observed :

> "It is axiomatic that the Courts must apply the principles of Justice, Equity and Good Conscience to transactions which come up before them for determination, even though the statutory provisions of the Transfer of Property Act are not made applicable." 14

The sole question to be decided was whether Section III(g) represented J. E. G. C. His lordship took the view that the formula in fact represented English equity. He observed :

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12. K.M.Sharma: Civil law in India (1969) Washington University Law Journal 1-40; See also V.S.Ramakrishnan: French law on Indian soil (1965) Lawyer 123-129; see also R.Whee: The Civil law and the Common law (1915) 14 Mich.L.Rev. 89 generally.

13. A.I.R. 1935 S.C. 228.

14. Ibid at pr. 16 p.230.

> "(T)he insistence in Section 111(g) ... that notice should be given in writing is intrinsic evidence of the fact that the formality is merely statutory and that it cannot trace its origin to any rule of Equity. Equity does not concern itself with mere forms and modes of procedure ... (N)otice ... by oral intimation ... (would not) in any way distur(b) the mind of the Chancery Judge." 15.

He then briefly examined the origins of the rule in England[16] and showed that in India

> "there is a substantial body of authority for the proposition that in respect of leases made before the Transfer of Property Act forfeiture is incurred when there is disclaimer of title or ... non payment of rent." 17.

He concludes that the rule in the Act was a mere rule of procedure.[18] This rather strict application of the English Chancery Court approach may have been occasioned by the fact that the lessee was hardly deserving of notice in the first place. Mahajan J. observed :

> "It is clear that in this case the tenant is a recalcitrant tenant and a habitual offender. For the best part of 25 years he has never paid rent without being sued in Court. Rent has been in arrears at times for six years, at other times for three years and at other times for four years and so on. And every time the landlord had to file a suit for ejectment which was always resisted by false defences. No rule of Justice, Equity and Good Conscience can be invoked for (such a) tenant." 19

This leaves us with a very unsatisfactory picture of what the contents of J.E.G.C. are and we are led to believe that they are in fact English equity and individual discretion as conditioned by the facts of the case.

A totally different approach was adopted by Gajendragadkar J. in Murari Lal v Devakaran.[20] Here the question was whether the principle

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15. Ibid pr.17 p.231.

16. Ibid pr.18 p.231

17. Ibid pr.19 p.231

18. Ibid at pr.23 p.233 col.1.

19. Ibid at pr.31 p.234.

20. A.I.R. 1965 S.C. 225.

that there must not be a clog on the equity of redemption (embodied in Section 60 of the Transfer of Property Act(1882) which did not apply to the State of Alvar when the mortgage in the instant case was in fact made) was a general principle in consonance with the J.E.G.C. The Supreme Court reversed the view of the High Court and held that the document in the present case did purport to make the mortgagee the absolute owner on the failure of the mortgagortto redeem.[21] With the facts out of the way the Court proceeded to consider that the following of the rules of J.E.G.C. implied.

His lordship referred to several Privy Council decisions to show that the early Privy Council had accepted the existence of mortgage by conditional sale in India[22] and that while the High Courts had maintained that unjust transactions will not be permitted, the approach of the High Courts had been frowned upon by the Privy Council in Thumbuswamy Modelly v Hossain Rowther.[23] But the common sense approach of the High Courts appealed to Gajendragadkar J. who examined the Hindu law texts to discover that the concept of the mortgage by conditional sale was perfectly acceptable to Hindu jurisprudence.[24] Faced with the Privy Council and the Hindu law texts against him, his lordship referred to Mahajan J.'s

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21. Ibid at pr.4 p.227.

22. Ibid at pr.7-8 pp 228-9 citing the following cases: Thumbuswamy Modelly v Hossain Rowther (1876) 1 Mad.1 (P.C.); Pattabhiramier v Venkatarow Naicken (1871) 13 M.I.A. 560; Kader Moideen v C.W.Neppean (1899) 25 I.A. 241; Mehrban Khan v Makhana A.I.R. 1930 P.C. 142.

23. (1876) I Mad. 1 (P.C.) The High Court cases are: Venkata Reddi v Parvati Ammal (1863) 1 M.H.C.R. 460; followed in Ramji v Chinto Sakharam (1864) 1 B.H.C.R. 199 followed in Bapuji Apaji v Senavaraji (1878) 2 Bom. 231 (per Westrop J. distinguishing the P.C. cases) Ramasami Sastrigal v Samiyappanayakam (1882) 3 Mad.179 at 190 (F.B.decision by majority, Turner J. distinguishing the P.C. position)

24. Ibid at p.230 referring to Kane: III H.D. 428; Nārada ; Mitākshara on Yājñavalka II 58; Ghose: Law of mortgages in India (T.L.L. 5d) Vol I, 56.

judgement in the 1953 case[25] we have discussed above and represented that case not as having decided that J.E.G.C. in fact meant following the approach of English equity, but as having established J.E.G.C. as a commonsense principle. He observed :

> "These observations in substance represent the same traditional approach in dealing with oppressive unjust and unreasonable restrictions imposed by the mortgagees on needy mortgagors, when mortgage documents are executed." 26.

He also found support in some High Court cases which had approved of Section 60 of the Transfer of Property Act as a just and equitable principle.[27]

This differs in style but not in approach from that of Mahajan J. In this case the Court examined the local approach to the problem as well as went into the English law and evolved a rule which was in consonance with common sense, as a general principle,[28] rather than expedient to meet the needs of the instant case. The reference to the earlier 1953 case is purely to establish a consistency because the principle in this case is much wider than the one conceived by Mahajan J.

More recently we have seen the Court revert back to the view that English law must in fact be applied. This is in the recent tort case of Khushru v Guzdur[29] where mention is made of the formula.[30] The case involved a conspiracy (of six persons) "to injure and harass the plaintiff ... (by giving) perverse rulings to prevent him from getting elected to the trustees of the Parsi Zorastrian Anjuman." One of the

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25. Supra f.n. 13 and the text corresponding to it.

26. Ibid at pr.15 f.231. See a similar conclusion at pr. 231.

27. See Amba Lal v Amba Lal A.I.R. 1957 Rajasthan 321; Sabh Raj v Chunder Mal A.I.R. 1960 Rajasthan 47; Nainu v Kishan Guju A.I.R. 1957 H.P. 46.

28. On the use of this principle see Derrett (cited f.n.2 supra) 148-152.

29. A.I.R. 1970 S.C. 1468.

30; Ibid at pr. 17 p.1474.

defendants apologised and was released by the plaintiff. The question was : Did this release operate to release the joint tort feasors ? The High Court (through Dhavan J. who is, in what is otherwise an unprecedented practice, mentioned by name in the Supreme Court judgement three times[31]) thought it did, which appears to be the opinion of the Indian High Courts on the subject.[32] But Sikri J. who read the judgement in the Supreme Court tried to show that though this was the law in England it was different in 1605[33] and that America followed a different rule.[34] Further he stressed that the English law did not accord release to joint tort feasors where the offence was trespass to the person or involved injuries to property (real or personal) unaccompanied by conversion or change of possession.[35] He concluded :

> "It seems to us that the rule of Common Law prior to Brown v Wooton ... (1605) ... adopted by the American Supreme Court is more in consonance with Equity, Justice and Good Conscience. In other words the plaintiff must have received full satisfaction or which the law must consider as such, from a tort feasor, before other joint tort feasors can rely on accord and satisfaction." 36

In his lordship's opinion an apology by the defendant "cannot be treated

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31. Ibid at pr.1, p.1469; pr.7, 1470; pr.10 p.1471.

32. See Makhan Lal v Panchmal Sheoprashad A.I.R. 1934 Nagpur 226 at 227; Shiva Sagar Lal v Mata Din A.I.R. 1949 All. 105; the other cases where the plaintiff accords with one defendant and sues the others (Ram Kukmar Singh v Ali Hasan (1909) 31 All.173 at 175; Har Krishna Lal v Haji Quarban A.I.R. 1942 Oudh 73) are distinguished by Sikri J. at pr.15 p.1474 "But in these cases the decree was not passed first against the tort feasor admitting liability." Note also the more recent case of V.E.Dachala v Rangaraju A.I.R. 1960 Madras 457 where the State recovered the proceeds from the illegal sale of diesel oil; the other person involved was deemed not liable (at pr.14, 14(a), 15 pp. 461-2.

33. Ibid at p.1473-4. The case in question is Brown v Wooton (1605) 80 E.R. 47.

34. Ibid at p.1473 col.1. See Lovejoy v Murray (1865-7) 18 Lawyer Edn 129.

35. Ibid at pr.14 p.1472 col.2.

36. Ibid at pr.17 p.1874

to be full satisfaction for the tort alleged to have been committed by the defendants." 37

The English law makes a distinction between a joint tort feasor and several concurrent tort feasors and lays down that a release discharges the joint tort feasor but not concurrent tort feasors.[38] The defendants were clearly joint tort feasors and the position at Common Law is that the law will not allow one person to get off and make a deal in a conspiracy because in a concerted action of that nature it is very difficult to allocate the liability. The released party could have been the one most responsible. Sikri J.'s distinction based on history in which he makes a reference to case law before 1605[39] and his following the "strict" Common Law, establishes a precedent for selective or eclectic use of the aspects of English legal history. It is possible that his lordship was in fact trying to do justice in the instant case and not allow the unapologetic defendants to get away. Is it not possible that Dhavan J., who was closer to the facts, thought it was the plaintiff who was trying to drag on a case merely to make an example of the defendants, even after he had received a frank confession and an apology for the whole conspiracy ?[40] Once again a broad principle has emerged to meet the needs of the instant case, but this time after strict adherence to the technical rules of English law.

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37. Ibid at pr.19 p.1474-5.

38. See Street on Torts (4d) 487 and the following cases cited by him Duck v Mayeu (1892) 2 Q.B. 511 (C.A.); Cutler v McPhail (1962) 2 Q.B. 292; Gardiner v Moore (1966) 1 All E.R. 365.

39. A.I.R. 1970 S.C. 1468 at 1471-2.

40. In a personal communique to the writer. Letter dated Oct. 18, 1971.

It appears that the Supreme Court have in the 1953 and the 1970 cases laid emphasis on following the English law (even though this might have been done in fact to meet the needs of the instant case). A far more comprehensive approach to the problem of finding the content of the formula was that of Gajendragadkar J. in the 1965 case where it is suggested that other laws particularly Indian law be looked into but the rule itself must be based on a common sense rule the object of which must be to establish rules which prevent injustice. The approach of the Courts in this case shows that judges will in moments of doubt still in fact find solace in the English law, often without reference to Indian conditions.

b. Indian Courts and their attitude to English Law.

It is only natural that a large part of Indian law should receive its inspiration from English law. This is not because of the lack of indigenous nourishment but because Indian statute law is based on English law.

But judges have been discerning in applying English law and stressed occasionally that it is not always applicable to India. Thus in two cases on the Workmen's Compensation Act the Courts refused to follow the English Law.[41] Again in J. C. Mehta v P. C. Mody[42] Chagla C.J. (for S. T. Desai and himself) refused to follow the English law in an insolvency matter as there was sufficient Indian precedent on the point. The same judges reiterated this position in an Income Tax case in

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41. Horwill J. in Alagappa Mudaliar v Veerappan A.I.R. 1942 Mad.116 at 117 col2 "I should have thought that there is very little reason to suppose that the Indian legislature had studied the corresponding English Act." Bai Kokilbai v Kisharlal Mangal Das (1942) Bom.139 at 149-40; but on the same statute contrast the attitude of Harries C.J. in Kamarhatty v Abdul Samad A.I.R. 1953 Calcutta 74 at pr.9-13 p.75 and the same bench in N I & S Co. v Monorma A.I.R. 1953 Cal. at pr.10 p.144 in which note the reference to a New Zealand case.

42. A.I.R. 1959 Bom. 289 at pr.4 p.291.

I. T. Commr. v Donald Miranda[43] and disapproved of the tribunal following the English law,[44] though they did make the same mistake later.[45] In Chauthmal v Sadarmal[46] Jagat Narain J. emphasised that the English concept of forfeiture was wider than that in the Transfer of Property Act. In Ram Dial v Sant Lal[47] while interpreting the meaning of "undue influence in an election matter" that the English statute was not in pari materia with the one before him. In Bari v Tukaram[48] Mudholkar J., while considering the custom of removing earth from the soil, observed :

> "I do not think it proper that the expression 'immemorial origin' is to be understood in India in the same sense as in England." 49

The same attitude is retained with respect to Easements. In Keshav Sahu v Dasrath[50] the Court discussing the concept of privacy stressed :

> "The fact that there is no custom of privacy known to the law of England can have no bearing on the question whether there can be in India a usage or custom of privacy." 51.

A recent article recounts the contributions of an Allahabad judge in this area.[52] However, one may contrast the attitude in Madras v Mohd. Ghani[53]

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43. A.I.R. 1959 Bom.33
44. Ibid pr.1 p.34.
45. Ibid see pr.7-8 pp.36-8.
46. A.I.R. 1959 Rajasthan 24 at pr.9-10 p.26.
47. A.I.R. 1959 S.C. 855 at pr.8 p.859.
48. A.I.R. 1959 Bom. 54.
49. Ibid at pr.4 p.55.
50. A.I.R. 1961 Or. 154.
51. Ibid at 155.
52. See Mr. R.K.Kapur: The Easement of Nuisance A.I.R. 1968 Jnl. 8, commenting on the following judgements of Dhavan J.: Bhagwati v Dwarika Prashad A.I.R. 1963 All.3; Bankey Lal v Kishanlal A.I.R. 1967 All.43. Note the comments on judicial method at pr.18 p.9.
53. A.I.R. 1959 Madras 464.

where it was admitted that English law does not know of the problem of riparian owners as it exists in India[54] but followed it all the same.[55]

There are however a lot of cases where the English law has in fact been followed without fuss. Thus in Hotel Imperial v Hotel Workers' Union[56] Wanchoo J. follows the law on the master-servant relationship in an industrial dispute case without much ado. In Saurashtra v Memon Haji Ismail[57] Hidayatullah J. follows the English law on "act of state" after some discussion.[58] In Union v Kishori Lal[59] Subha Rao J. (for the majority) was constructing a deed; but despite his claim to be uninfluenced by authority[60] he regarded the English law on this point well settled[61] and followed it.[62] Sarkar J. (in dissent) did not dispute the authority of the English case law either.[63] In I. T. Commr. v Jairam Valji[64] the Court makes extended use of English case law on an Income Tax point.[65] In Maktul Bhai v Man Bhai[66] Gajendragadkar J. followed the English law of stare decisis.[67]

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54. Ibid at pr.6.

55. Ibid at pr.13 p.467.

56. A.I.R. 1957 S.C. 1342. The case law cited is: pr.10 p.1345 citing Hanley v Pease Ltd. (1915) 1K.B. 698; Wallwork v Fielding (1922) 2 K.B.66 and Indian case law.

57. A.I.R. 1959 S.C. 1383 pr.2o p.1390.

58. Ibid pr.10-17 pp.1387-88.

59. A.I.R. 1959 S.C. 1362.

60. Ibid at 1368.

61. Ibid at pr.5 p.1366-7.

62. Ibid at pr.9 p.1368.

63. Ibid at pr.26 p.1373.

64. A.I.R. 1959 S.C. 291.

65. Ibid at pr.2 p.292-3; pr.8-9 p.295; pr.13 p.296; pr.20 p.298; pr.21 p.299; pr.22-3 p.299.

66. A.I.R. 1958 S.C. 918.

67. Ibid at pr.9 p.922-3 quoting from the Corpus Juris Secundum and 19 Halsbury (2d) 257 pr.557.

The High Courts have followed the same course[68] and in the recent Madras case of Sundaram Mills v Union[69] Ramakrishan J. (for himself and Sadasivan J.) preserved the Common Law doctrine that State dues must be paid first.

The Supreme Court has between 1950 and 1970 decided 172 cases on the Indian Contract Act 1872, 31 on the Indian Trusts Act 1882, 36 on the Specific Relief Acts of 1877 and 1963, 942 on Criminal Law and 20 (including Kushru v Guzder which we have discussed above) on torts.[70] In all of these areas the English law has by and large been followed. But care has been taken not to offend the textual provisions of the text in the statute in each case. Thus in Satyabrata Mugneeram[71] the Court stressed that while Section 56 of the Indian Contract did represent the doctrine of frustration in English law, the textual requirements did suggest some differences. The classic case on this is in fact the Privy Council case, in which they followed the text of Section 53A of the Transfer of Property Act, and declared that the doctrine of part performance which that Section embodied could on the terms of the text only be

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68. See Madras v Mohd. Ghani A.I.R. 1957 Mad. 464 at pr.13 p.467 (on Easements); Kalappan v Kunhi Raman (1957) Mad. 176 at 185. "It is to our mind clear that the (Indian) Statute enacts the same rule" (on Section 128 of the Indian Contract Act 1872); Madras v Ramalingam & Co. A.I.R. 1957 Madras 212 (Contract) at pp.217-8; 221-2, 224-7, 235-6 and result thereof.

69. A.I.R. 1970 Madras 190 at pr.5 p.192.

70. A list of all these cases was compiled from the All India Reporter. The list of Criminal law cases is taken from Soonavala: The Supreme Court and Criminal law (1968 Edn) pp.iv-lxliii. It includes cases on the Indian Penal Code 1860, the Evidence Act 1872, the Criminal Procedure Act 1898 and the relevant provisions of the Constitution. The cases on the Contract Act 1872 include cases on Agency.

71. A.I.R. 1954 S.C. 44.

used as a defence and not to establish a right.[72] Again, the English law on offer and acceptance has not been followed because of the terms of the Contract Act in cases of contract by telephone.[73]

But the Courts have also tried to evolve in some cases a different approach of their own. An extremely good example of the influence of English law will be analysed in Chapter VII where we will go into the way the Supreme Court has discussed the doctrine of Crown privilege as embodied in Section 123 of the Indian Evidence Act 1872. Another good example of the way the English law can be twisted in an Indian context is Sitaram v Santanu Prashad[74] in which the Court discussed the doctrine of vicarious liability in tort. Hidayatullah and Bachawat JJ. used the English law to hold that the owner of a taxi cab was not liable for an accident caused by his driver allowing the cleaner of the car to drive the car. Subba Rao J. too used the English law to extend the liability of the absentee taxi car owner, and thus extending the principles of vicarious liability, so that the person who could afford to pay the claim of the crippled man was liable, along with his insurance company.

Judges are keenly aware that the English law must not be blindly followed. This is very well illustrated by an incident related by the Attorney General recounting his arguing the case Joeseph Vellukumel v Reserve Bank of India.[75] He observed :

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72. P.K.Das v Dantmara Tea Estate Ltd. A.I.R. 1940 P.C. 1.

73. See Bhagwan Das v Girdhari Lal & Co. A.I.R. 1966 S.C. 43 (per Shah J.) For another example of this see Lakshmi Amma v T.Narayana Bhatta A.I.R. 1970 S.C. 1367 (on undue influence in Section 16 of the Contract Act 1872) and note the comments of G.M.San (1971) 13 J.I.L.I. 127-134.

74. A.I.R. 1966 S.C. 1697.

75. (1962) 3 (Supp.) S.C.R. 632.

"(I) referred to American procedure which showed that even in the United States, the executive ... could initiate the closure ... of Banks. Justice Kapur was a member of the bench. He was particularly well known for his fondness for English decisions, particularly those of the House of Lords. When I cited the American cases he interrupted : 'Mr. Attorney General, why must you travel that far, cannot you find authorities nearer home ?' I promptly replied 'Yes, my lord, the position is the same in Japan ...'" 76

The whole Court, including Justice Kapur, laughed.

Indian Courts are aware that they must no longer look to the Courts of law outside the country for precedents. But they are also aware that they must interpret the law while taking into account the law of England, because the law in India is based on English law. The facts of the case before them, the text of the statutes and local conditions have been brought to bear in the interpretation of statutes. Certainly the emphasis on English law will continue. But beneath this following of English law, the Courts are evolving precedents which if read in the factual context of their respective cases disclose a not so apparent but extremely real adaptation of English law to Indian situations. There are of course, as we have seen, numerous cases where the English law is referred to, and followed without much fuss. The breakaway process is naturally gradual and formal adherence to English law i[illegible] continues

To conclude, the Supreme Court in interpreting the content of J.E.G.C. look to the English law, but they have always been very selective in the process of selecting what the English law on a particular point is in fact. They create precedents which are expressed in

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76. Setalvad: My life (1970) at 367. Note also the friendly but teasing comments made by S.R.Das C.J. about Justice Kapur (quoted by Setalvad at 367) " ... Then comes my Brother Kapur, when an argument is in full swing, he distinctly remembers that there is a decision either of the House of Lords or of the Privy Council which is pat on the point under discussion but that decision he cannot for the moment unfortunately lay his hands on and all members of the Bar cannot find it until the case is over."

terms of English law, but applied to given Indian facts. The ratio of the cases is often confused (as in the three J.E.G.C. cases above) and difficult to follow, but the approach is distinctly Indian. It will take some time for precedents illustrating this distinct adaptation process to mature, as they have in America.[77] The profess is slow, confusing and indirect. A foreign observer commenting on the process of adaptation of English law in the West Indies makes the following remarks, which are very appropriate in India's context as well :

> "At the present time it is premature to speak of West Indian law. For such uniformity of content and approach to be found among the fifteen different legal systems in the West Indies is largely a result of receiving and adopting English law. In some branches of law there has been a response to local needs, but too often perhaps it has taken the form of piece-meal amendment to English provisions, too rarely has it been from an inquiry into first principles. If there is ever to be a body of law which can realistically be called West Indian, it can only be achieved by a systematic re-thinking of the basic legal principles in the context of the West Indies through some collaborative effort between the territories concerned." 78.

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77. See for example Roscoe Pound : Jurisprudence (1959) on the fate of Ryland v Fletcher in the United States.

78. K. W. Patchett: English law in the West Indies. 12 I.C.L.Q. 922 at 962.

5. The Supreme Court and the Use of Interveners.

The presence of an intervener in a case often widens the scope of the appeal because the intervener brings with him a point of view which may be different from the point of view of the parties in the case in which an intervention has been made. So much so that intervention has been compared to political lobbying.[1]

The Supreme Court rules say very little about interveners and the principles that the Court will follow to determine whether they will allow an intervention or not. The word "intervener" is used only in Order VI r.2 (iii) which reads :

> "2. The power of the Court in relation to the following matters may be exercised by a single judge sitting in Chambers :-
>
> (iii) ... application for striking out or adding party or for intervention in suit, appeal or other proceeding." 2

The only other relevant provision is Order XLIII which reads :

> "1. The Court may direct notice of any proceedings to be given to the Attorney General on India or the Advocate General of any State (;) and the Attorney General for India or the Advocate General to whom such notice is given may appear and take such part in the proceedings as he may be advised.
>
> 2. The Attorney General for India or the Advocate General for any State may apply to be heard in any proceeding before the Court and the Court may, if in its opinion the justice of the case so requires, permit the Attorney General for India or the Advocate General applying to appear and be heard subject to such terms as to costs or otherwise as the Court thinks fit." 3

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1. On the importance of interveners see Philip B. Kurkland: Towards a political Supreme Court (1969) 37 Univ. of Chicago Law Review 19 at 34-6; R.Seidman: The judicial process reconsidered in the light of the role theory (1969) 32 Mod.L.Rev. 516 at 525; Vose: Litigation as a pressure group activity 282 Annals 20, 27-30; Harper and Ellington: Lobbyists before the Court (1953) 101 Univ. of Pa.L.Rev. 1172 Wiener: The Supreme Court's new rules (1954) 68 Har.L.Rev. 20 80. Unfortunately very little has been written in India on the subject. See Agarwala & Datta: Practice and procedure in the Supreme Court of India 157.

2. Supreme Court Rules 1966 as amended up to date.

3. Supreme Court Rules 1966 as amended up to date.

Thus we can see that no specific rules about intervention exist. Thus the Supreme Court observed in M. H. Qureshi v Bihar :[4]

> "There is no other express provision for permitting a third party to intervene in the proceedings before this Court. In practice, however, this Court, in (the) exercise of its inherent powers, allows a third party to intervene when such third party is party to some proceedings in this Court or in the High Court, where the same or similar questions are in issue, for the decision of this Court will conclude the case of that party."

Although in M/S Ram Chand Jagdish Chand v Union[5] the Court would not allow a party whose petition had been dismissed by a High Court to intervene, its policy in allowing intervention has been fairly liberal. A statistical breakdown of the incidence of intervention (as given in reported cases) is given in the Table below :

Year	No. of Reported Cases in which Intervention Permitted	Year	No. of Reported Cases in which Intervention Permitted
1950	4	1961	19
1951	9	1962	22
1952	10	1963	21
1953	12	1964	16
1954	13	1965	19
1955	5	1966	29
1956	3	1967	14
1957	10	1968	19
1958	12	1969	10
1959	13	1970	21
1960	20		

Source: A.I.R. Supreme Court Reports 1950-70 (See Appendix)

Interveners have the right to address the Court and in Khyerbari v Assam[6] the Court even granted the counsel for the intervener the right to reply. In Punjab v S.S.Singh[7] there were two appeals before

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4. A.I.R. 1958 S.C. 731 at pr.11 p.738-9.

5. A.I.R. 1963 S.C. 563 at pr.20 p.569.

6. A.I.R. 1964 S.C. 925

7. A.I.R. 1961 S.C. 493

the Court - one of which was compromised. The Court allowed the arguments of the counsel in the case that was compromised to be transferred to the case before them. The judgement shows a heavy reliance on the arguments of the above mentioned counsel.[8]

The intervener certainly plays an extremely important role in a case. Thus in Ramakrishan Ramnath v Kamptee Municipality[9] the Attorney General (along with S. M. Sikri - then Advocate General of Punjab and now the Chief Justice of India) intervened to widen a comparitively simple matter of octroi duty to become an important constitutional issue.[10] It should be noted that in Gopalan v Madras[11] the Attorney General of India was instructed by the same agent as the State of Madras. This was not so in other "public order" cases like Romesh Thappar v Madras[12] and Brij Bhushan v Delhi[13] in which the Union did not intervene officially. Can this account for the fact that wider issues were raised in the former case and a different anti-government result arrived at in the latter ? The Attorney General in his autobiography[14] recounts the role that he played in the former case but makes no mention of the latter cases in which he participated as well. In Rashid Ahmad v Uttar Pradesh[16] the Union of India and the State of Uttar Pradesh intervened separately and the argument of the latter was

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8. Ibid at pr.11 p.500; pr.17 p.502; pr.24 p.505; pr.26 p.505; pr.30 p.507.

9. A.I.R. 1950 S.C. 11.

10. Ibid see para 9, p.13.

11. A.I.R. 1950 S.C. 27. See Setalvad (the then Attorney General) recounting this case in his autobiography My Life (1971) 154-9.

12. A.I.R. 1950 S.C. 124.

13. A.I.R. 1950 S.C. 127. Note the fact that Mr. Setalvad was involved in the latter.

14. Setalvad: My Life (supra f.n.11.) 154 ff.

16. A.I.R. 1950 S.C. 163.

rejected by the Court.[17] The role of Sir Alladi Krishnaswami (who intervened for the Union of India) in Bharat Bank v Employees[18] is quite evident from the judgement of the Court.[19] This can also be said of the Attorney General's role in Tripura v East Bengal,[20] Janardhan Reddy v Hyderabad[21] and the famous preventive detention case of S. Krishnan v Union[22] and several other cases.[23]

The Court's policy in asking for and allowing intervention has been by no means consistent. Thus in Ashwini Kumar v Arabinda Bose[24] the Court admitted interveners to have "advantage of a full argument from all points of view"[25] but it did not ask for a similar intervention in other cases involving the Bar[26] - one of which was important enough for the Attorney General to recount in his memoirs and to have a park named after him as a sign of gratitude from the Muzzaffarnagar Bar Association whom he represented.[27] Again, in the important case of T. C. v Bombay Co. Ltd.[28] the Union of India did not intervene - probably because the

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17. Ibid at pr. 6 p.165.

18. A.I.R. 1950 S.C. 188.

19. Ibid at pr.35 p.200; pr.40 p.202; pr.50 p.205.

20. A.I.R. 1951 S.C. 23 at pr.53 p.34; pr.55 p.35; pr.59 p.36; pr.86 p.41.

21. A.I.R. 1951 S.C. 124.

22. A.I.R. 1951 S.C. 301 at pr.10 p.303-4; pr.21 p.306; pr.23 p.306-7.

23. See Santosh Kumar v State A.I.R. 1951 S.C. 202; U.C.Bank v Workmen A.I.R. 1951 S.C. 230 (in both these cases Messrs. Setalvad and Sikri intervened on behalf of the Government of India) Joylal v Bihar A.I.R. 1951 S.C. 484 (An "essential commodities" case where G.N.Joshi appeared for the Government of India).

24. A.I.R. 1952 S.C. 369.

25. Ibid at pr.5 p.371. See also pr.36 p.379.

26. See Shiv Narain v Judge, Allahabad High Court A.I.R. 1953 S.C. 368; Babul Chandra v Chief Justice and Judges A.I.R. 1954 S.C. 524; Nageshwara v Judges of the Nagpur High Court A.I.R. 1955 S.C. 223; Brahma Prakash v U.P. (1953) S.C.R. 1169.

27. Setalvad: My Life (supra f.n.11) at p.195.

28. A.I.R. 1962 S.C. 367.

Attorney General appeared for the State involved. The same is true of the famous case of Bengal Immunity Co. v Bihar,[29] but the Union had intervened in Bombay United Motors Co. Ltd.[30] which was overruled in the last mentioned case. Can this account for the different results arrived at in the three cases ? Again the Union did intervene in the contempt case of Ashwini Kumar v Arabinda Bose,[31] but not in M. Y. Shareef v Judges of the Nagpur High Court.[32]

We shall never know what the exact effect of the intervention was in each and every case. But there are a large number of cases where the Court specifically refers to the arguments of the counsel for the intervener.[33] In M. H.Qureshi v Bihar[34] a pandit appeared as amicus curie and the Court refers to him in the judgement. A foreign observer commenting on his role says :

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29. A.I.R. 1955 S.C. 661.

30. A.I.R. 1952 S.C. 252 at pr.9 p.255-6.

31. A.I.R. 1953 S.C. 75.

32. A.I.R. 1955 S.C. 19.

33. Ramakrishna Ramnath v Kamptee Municipality A.I.R. 1950 S.C. 11 at pr.9 p.13. Rashid Ahmad v Municipal Board Kairana A.I.R. 1950 S.C. 163 at pr.6 p.165; Bharat Bank v Employees A.I.R. 1950 S.C. 188 at pr.35 p.200, pr.40 p.202; pr.50 p.205; State of Tripura v East Bengal A.I.R. 1951 S.C. 23 pr.53 p.34; pr.55 p.35; pr.59 p.36; pr.86 p.41. Janrdhan Reddy v Hyderabad A.I.R. 1951 S.C. 124 at pr.4 p.126; S.Krishan v Madras A.I.R. 1951 S.C. 301 at pr.10 p.303-4; pr.21 p.306; pr.23 p.306-7; Ashwini Kumar v Arabinda Bose A.I.R. 1952 S.C. 369 at pr.5 p.371; pr.36 p.379; W.B. v United Motors Co. Ltd. A.I.R. 1953 S.C. 252 at pr.9 p.255-6; State of T.C. v S.V.C.etc. A.I.R. 1953 S.C. 332 at pr.39 p.343; Sundarmier & Co. v A.P. A.I.R. 1952 S.C. 468 at pr.11 p.478; M.R.Qureshi v Bihar A.I.R. 1958 S.C. 78 31 at 736, 739, 747-9; Godse v Maharashtra A.I.R. 1961 S.C. 600 at pr.3 p.601; Saifuddin Saheb v Bombay A.I.R. 1962 S.C. 853 at pr.7, 858-9; W.B. v Union A.I.R. 1963 S.C. 1241 at pr.71; Anil Starch Ltd. v Workers' Union A.I.R. 1960 S.C. 1346 at pr.5 p.1348; Himgir Rampur Coal Ltd. v Orissa A.I.R. 1961 S.C. 459 at pr.8 p.463-4; L.I.C. v S.V.Oak A.IIR. 1965 S.C. 975 at pr.9, 979.

34. A.I.R. 1958 S.C. 731

"It is fair to conclude that the judges generally relied upon him rather for statistical and policy matters, than the orthodox doctrine with which (with one exception) being Hindus the judges were familiar." 35

We can see that the range of interests represented by interveners in a case is very wide. Thus in the famous case of Golak Nath v Punjab[36] the interveners included the Attorney General for India , the Advocate Generals of ten States and several individuals. In Jalan Trading Co. v Mill Mazdoor Sabha[37] the nineteen interveners included two trade union organisations. In the Kerala Education case[38] there were eleven interveners, most of them representing religious, cultural and educational bodies. In Sundarmier & Co. v A. P.[39] specific mention is made of the fact that counsel for two interveners (in this case two companies) supported the arguments of the respondent[40] and that one of them raised a separate and independent point.[41] To give an estimate of the range of intervention in cases before the Supreme Court a list of the 301 cases in which the Court allowed intervention is appended. It will be seen that in a large variety of cases stretching from Constitutional law to industrial matters the Court has permitted a vast number of bodies to present their case. The Chief Justice of India, talking about the impact

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35. Derrett (1958) 8 I.C.L.Q. 221 at 223 see f.n.6.

36. A.I.R. 1967 S.C. 1643.

37. A.I.R. 1967 S.C. 691.

38. A.I.R. 1958 S.C. 956.

39. A.I.R. 1958 S.C. 468

40. Ibid at pr.11 p.478.

41. Ibid at pr.12 p.478.

of interveners at a recent academic gathering observed :

> "It is with the help of interveners that we are able to place a provision of law in its proper perspective and allow the views of all the varied interests that are affected, to be represented. As the Highest Court of appeal in the country, we are forced to look at the issues involved in a manner in which we are able to go beyond the facts of a particular case and adjudicate on a point of law, fully conscious of the public and private issues involved." 42

This view is supported by the Attorney General, who in his memoirs recounts the impact that he made in the several cases in which he intervened in his official capacity for the Union of India.[43]

The role of the Attorney General in broadening the issues of a case are by no means limited to cases where he appears as intervener. He also appears for the Government, when it is a party in a case and represents their point of view. As Setalvad, the first Attorney General, puts it :

> "As Attorney General, it was necessary for me to appear in the various High Courts on behalf of the Union of India when an important question affecting the Union arose." 44

The following Table shows the extent to which the Attorney General and the Solicitor Generals of India appeared for the governmental agencies, and represented the Government's point of view. The figures are extracted from the All India Reporter and in each case represent an estimate for each year.

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42. In reply to a question asked by me at a talk given by him in the Institute of Advanced Legal Studies June 21, 1971.

43. See Setalvad: My life (1971) and note the comments he makes on his contributions to several cases. He refers to: Gopalan v Madras A.I.R. 1950 S.C. 27 at p.154-9; to In Re Delhi Laws (1951) at p.165-7; Bombay v Balsara (1951) at 167-9 (note that in this case he appeared for the State of Bombay); V.G.Row v Madras (1952) at p.185-7; W.B. v Anwar Ali (1952) at p.197-9.

44. Setalvad: My Life (1971) at 161. Note that he justifies his taking up a private case at 193 f.n.7 and says "I could do so as the Government of India were not concerned in the matter." The case was Ammer-un-nissa Begum v Mahboob Begum A.I.R. 1953 S.C. 91.

TABLE III showing a rough estimate of cases in which the Attorney and Solicitor Generals appear for a Government Department.

Year	Appearances
1950	5
1951	15
1953	38
1956	23
1957	19
1958	26
1959	37
1960	30
1961	29
1962	36
1963	30
1964	22
1965	38
1966	45
1967	27
1968	12
1969	27

Source : A.I.R. Supreme Court Reports

Note: These are rough estimates and include only such cases as I am aware of. The Table is purely illustrative and does not try to stress a pattern, though it should be noted that between 1958 and 1961 the Attorney and Solicitor Generals appeared more frequently in Tax cases.

In this way the Attorney General makes his impact felt in all issues in which the Government is involved. He naturally represents a viewpoint which is not always his own. There are also however several cases where the Attorney General and Solicitor Generals appeared against the Government.[45] The most notable example is Kochunni v Madras[46] where the Attorney General persuaded the Court to overrule a line of authority which he himself had helped to establish earlier.

Another way in which the issues in a case can be widened is the system whereby the Court allows several appeals which concern the same subject matter to be heard together. A brief survey of some recent cases in which this has been done will help to show the effect of this.[47] Later in the thesis this factor must be borne in mind when broad conclusions are allowed to emerge from multi-case appeals.

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45. e.g. Mohanlal v A.P. A.I.R. 1955 S.C. 786; M.K.Ranganathan v State A.I.R. 1955 S.C. 604; Bombay v S.S.Miranda Ltd. A.I.R. 1960 S.C. 893; K.Kochunni v Madras A.I.R. 1960 S.C. 1080; Madras v Noor Prashad & Co. A.I.R. 1960 S.C. 1234; Mahboob Sharif & Sons v Mysore I.T.A. Authority A.I.R. 1961 S.C. 484; Amalgamated Coalfields v Janpada Sabha A.I.R. 1961 S.C. 1214; Jute & Gunny Motors Ltd. v Union A.I.R. 1961 S.C. 1214; Diamond Sugar Mill Ltd. v U.P. A.I.R. 1961 S.C. 652; T.K.Co. v Bihar A.I.R. 1963 S.C. 577; Valji Bhai v Bombay A.I.R. 1963 S.C. 1820; Govind Rao v U.P. A.I.R. 1965 S.C. 1220; Rajakkohmiah v Mysore A.I.R. 1967 S.C. 393.

46. A.I.R. 1960 S.C. 1080.

47. See in the 1970 Volume of A.I.R. (S.C.Vol.) Maharashtra v H.N.Rao A.I.R. 1970 S.C. 1157 (discussed infra, Chapter III, on Article 31(2)); Ahmedabad Corp. v New S.S.Wvg Co. A.I.R. 1970 S.C. 1293 (municipal taxes declared ultra vires the Constitution); Rajasthan v Kartar Singh A.I.R. 1970 S.C. 1305 (on the Evidence Act 1872 and the Penal Code 1860); S.J.Hospital v K.S.Sethi A.I.R. 1970 S.C. 1407 on the meaning of "industry" in S2(g) of the Industrial Disputes Act 1947; Bihar v Union A.I.R. 1970 S.C. 1446 see pr.1 p.1447-8; Mohd. Ibrahim v S.T.A.Tribunal A.I.R. 1970 S.C. 1542 (S7(3) Motor Vehicles Act 1939 limited number of stage carriages); R.D. Chemical Co. v Comp.Law Board A.I.R. 1970 S.C. 1789, on the meaning of satisfaction of government, on the appointment of a managing agency; Rajendra Singh v Union A.I.R. 1970 S.C. 1946 (on Art. 366(2) of the Constitution); Kerala v Mother Provincial A.I.R. 1970 S.C. 2079 at pr.3 p.2080 (Statute declared ultra vires the Constitution).

One cannot gauge the effect of all these factors on an appellate Court. This is all the more difficult in the context of the fact that Indian Law Reports no longer publish arguments of counsel. But is is important to any study of an appellate Court that these factors be borne in mind. It is for this reason that a list of all the cases in which intervention was permitted, together with a list of the interveners who appeared in them,has been compiled and added as an Appendix. The impact of the intervener in each case is discussed later in the appropriate place.

For the present, one can conclude with a comment on the American Supreme Court, which is equally appropriate for its Indian counterpart :

> "What we have come to see is the development of a lobbying practice, more decorous than the ones used in legislative halls but directed to the same ends. The Court instead of squelching the practice, has encouraged it." 48.

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48. Philip Kurkland: Towards a political Supreme Court (1969) 37 Univ. of Chicago Law Rev. 19 at 35.

6. Problems of Jurisdiction, Arrears and Procedure.

The Supreme Court unlike the Federal Court does not merely have appellate jurisdiction in constitutional mattters.[1] It has original jurisdiction where fundamental rights are infringed,[2] and to decide a dispute between the Union and the States or between the States inter se.[3] Its appellate jurisdiction in civil matters extends to cases where the subject matter of the dispute is valued at over Rs. 20,000.[4] Recently the Law Commission[5] have suggested that this limit be increased to Rs.100,000 following the example set by the Rajya Sabha's abortive attempt to do the same.[6] It also has a criminal appellate jurisdiction[7] (which was increased in 1970[8]) and a discretionary jurisdiction to grant special leave to appeal, in both criminal and civil matters "from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."[9]

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1. Section 205 of the Government of India Act 1935; Article 132 of the Constitution.

2. Article 32 of the Constitution (on this there have been between 1950-70 112 reported cases in the A.I.R. S.C.

3. Article 131. On this there have been two cases: W.B. v Union A.I.R. 1963 S.C. 1241; Biharv Union A.I.R. 1970 S.C. 1446. But see also Virenedra v U.P. A.I.R. 1954 S.C. 447.

4. Article 133 of the Constitution.

5. See the recent circular of the Law Commission published A.I.R. 1971 Journal 97.

6. The Supreme Court (Enhancement of Valuation Civil Appellate Jurisdiction) Bill 1970, which was passed by that House on Aug.3, 1970 but lapsed before the Lok Sabha could consider it.

7. Article 134 of the Constitution.

8. The Supreme Court (Enlargement of Jurisdiction) Act (28 of) 1970, which grants a right to appeal to the Supreme Court where the High Court reverses an acquittal or in a case which it has withdrawn to itself, gives a punishment of imprisonment for ten years or more or life imprisonment.

9. Article 136 of the Constitution.

It takes over from the Federal Court jurisdiction to proceed to hear a case where a right to appeal existed to the Federal Court,[10] and like that Court has an ~~appellate~~ advisory jurisdiction[11] which it has exercised five times.[12] The Court also has jurisdiction under Article 71 of the Constitution to decide disputes arising out of the election of the President and the Vice-President.[13] Under Article 317 of the Constitution the Court has a special jurisdiction to ensure that the removal of a member of the Public Service Commission is made in the manner prescribed by the Constitution.[14]

Parliament has also used its powers under Article 138 to enlarge the jurisdiction of the Supreme Court in certain matters. Thus under Section 527 of the Criminal Procedure Code 1898 (as amended) the court has the right to entertain applications for the transfer of the hearing of a criminal case from one place to another. This jurisdiction

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10. Article 135 of the Constitution. The Supreme Court has decided the following reported cases on this : Bombay v Khushaldas A.I.R. 1950 S.C. 222 (an important case on certirari and natural justine) and Janardhan Reddy v Hyderabad A.I.R. 1951 S.C. 124 where the Court vide Kania J. would not extend its jurisdiction to hear appeals and fill a lacunae in the Constitution; Daji Saheb v Shakar Rao A.I.R. 1956 S.C. 29; Garikapatti v Subbiah Chowdhry A.I.R. 1957 S.C. 540 where it was held (though not without dissent) that an appeal to the Court lay even where there was a right to appeal to the Federal Court; Yellapa Gouda v Basangouda A.I.R. 1960 S.C. 808.

11. Article 143 of the Constitution.

12. The cases are : In re Delhi Laws etc. A.I.R. 1951 S.C. 332; In re Berubari Union A.I.R. 1960 S.C. 845; In re Kerala Education Bill A.I.R. 1958 S.C. 956; In re Sea Customs Act A.I.R. 1963 S.C. 1760; In re Article 143 A.I.R. 1965 S.C. 745.

13. See Order of the Supreme Court Rules 1966, read with Part III of the Presidential and Vice Presidential Act (31 of) 1952. Order XXXIX.

14. See Order XXXVIII of the Supreme Court Rules 1966. The machinery for the exercise of jurisdiction under this Order is made by the President of India. The Court communicates with him through the Registrar of the Court (see R.i and ii) Note the following rule in the order: "No Court fee or process fee shall be payable in any connection with any reference dealt with by the Court under this order."

is very wide and an interesting body of case law has accumulated.[15] The Court goes into considerable detail considering the entire record of the case[16] and going into various factors including the effects of political pressure.[17] Appeals also lie to the Supreme Court under Section 38 of the Advocates Act 1961[18] Under Section 257 of the Income Tax Act 1961 an appellate tribunal may

> "in the event of a conflict of decisions of High Courts in respect of any question of law ... draw up a statement of the case and refer it through its President direct to the Supreme Court."

Section 261 of the same Act lays down :

> "An appeal shall lie direct to the Supreme Court from any judge of the High Court delivered of a reference under Section 256 which the High Court certifies to be a fit one for appeal to the High Court."

More recently there is a direct right to appeal to the Supreme Court under Section 55 of the Monopolies Restriction Act 1969 and a right to make a reference to the Court under Section 7(2) of the same enactment.[19] All this is in addition to the tremendously wide jurisdiction that the Court enjoys under Article 136 of the Constitution.

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15. R.P.Kapur v Punjab Ptn. no 19 of 1960 decided Dec.16, 1960.

16. Hazara Singh Gill v Punjab A.I.R. 1965 S.C. 720.

17. See the leading case of G.X.Francis v Banke Bihari Singh A.I.R. 1958 S.C. 309; Gurcharan Das Chaddha v Rajasthan T/Ptn. 37/65 decided Apr. 4, 1966; Lakkhan Lal Kapur v Dr. A.N.Mukerjee T.P.2/1965 decided Apr.9,1965; R.P.Kapur v Dalip Singh T.P. 25/65 decided Nov.8,1965. Note the Supreme Court cannot use this power where a Court of Record convicts for contempt of Court. See Sukhdev Singh v Chief Justice Teja Singh A.I.R. 1954 S.C. 186. All these cases are discussed by Datta and Agarwalla: Practice and Procedure of the Supreme Court of India (1967) 38-41.

18. See Order V of the Supreme Court Rules 1966. See also the case of O.N.Mohindrov v Bar Council Delhi A.I.R. 1968 S.C. 888 where Order V R.77 came up for interpretation.

19. On Jan. 7, 1971 the Supreme Court added Order XXA to govern the appellate procedure in such cases and Order XXXVIII to deal with the reference under Section 7(2) of the Act.

This tremendous jurisdiction has led to the accumulation of a lot of arrears of cases in the Court, prompting the present Chief Justice to make the following remarks :

> "As far as I am aware no final Court of a country has been given original jurisdiction to deal with alleged breaches of fundamental rights. It is a good thing to have, but the public is not aware of the heavy load the Supreme Court of India carries. In no other country do election appeals lie as of right to the final Court of the country. No other such Court has to settle the labour disputes of the country. Our Supreme Court deals with the dismissals of employees, retrenchment bonus, wage scales, gratuity, tiffin allowance and a host of other things. Recently Parliament has in its infinite wisdom conferred on it more criminal jurisdiction. A right to appeal has been given where the High Court reverses an order of acquittal and awards a sentence of ten years or more." 20

Given below is a list of the arrears that have accumulated in the Court over the years.

Arrears are slowly piling up. The judges are obviously worried. The present Chief Justice recently used them as an excuse for not writing elegant judgements.[21] The problem became very serious by 1960. In that year the legislature passed an Act[22] which raised the total number of judges in the Supreme Court from eight to fourteen. Since then the Court has been very troubled by these arrears and has amended its procedure and changed its interpretation of its jurisdiction to accommodate the pressures of a long waiting-list.

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20. Chief Justice Sikri, Inaugural Address Chanigarh Bar Association (1971) I S.C.J. 72 at p.73 col.1.

21. S.M.Sikri: Lecture, Insititute of Advanced Legal Studies, June 21, 1971.

22. The Supreme Court Judges Act (17 of) 1960.

STATEMENTS showing Institution and Disposal of Cases, 1951 - 1971

Sources : supplied by the Registrar of the Supreme Court by the courtesy of Mr. Justice S. M. Sikri, Chief Justice of India.

Note : Detailed Tables showing disposal and arrears for 1950 to January 1972 are contained in Appendix II of the Thesis

SUPREME COURT OF INDIA

Statement I

STATEMENT SHOWING INSTITUTIONS OF APPEALS - CIVIL AND CRIMINAL, SPECIAL LEAVE PETITIONS - CIVIL & CRIMINAL, WRIT PETITIONS, AND MISCELLANEOUS PETITIONS - CIVIL & CRIMINAL DURING THE YEARS 1951 TO 1960

Year	Civil Appeals.	Crl. Appeals.	Writ Petitions	Spl. Leave Petitions (Civil)	Spl. Leave Petitions (Crl.)	Total of Col Nos.1 to 5.	Civil Misc. Petitions	Crl. Misc. Petitions	Total of Comns. 6 to 8
	1.	2.	3.	4.	5.	6.	7.	8.	9.
1951	176	73	686	200	467	1602	*	*	1602
1952	208	112	495	248	402	1465	*	*	1465
1953	261	97	409	348	602	1717	*	*	1717
1954	242	153	694	368	674	2131	*	*	2131
1955	354	152	446	451	708	2111	*	512	2623
1956	422	208	257	725	725	2337	*	510	2847
1957	795	203	171	645	646	2460	*	585	3045
1958	548	153	170	781	760	2418	1689	761	4868
1959	531	246	200	753	917	2647	1858	946	5451
1960	665	253	358	903	1068	3247	2369	825	6441

SUPREME COURT OF INDIA

Statement II

STATEMENT SHOWING INSTITUTIONS OF APPEALS - CIVIL AND CRIMINAL, SPECIAL LEAVE PETITIONS - CIVIL & CRIMINAL, WRIT PETITIONS, AND MISCELLANEOUS PETITIONS - CIVIL & CRIMINAL DURING THE YEARS 1961 TO 1971

Year	Civil Appeals.	Crl. Appeals.	Writ Petitions	Spl. Leave Petitions (Civil)	Spl. Leave Petitions (Crl.)	Total of Col.Nos. 1 to 5	Civil Misc. Petitions.	Criminal Misc. Petitions	Total of Colmns. 6 to 8.
	1.	2.	3.	4.	5.	6.	7.	8.	9.
1961	646	193	365	1034	978	3216	2635	*	5851
1962	891	215	239	1224	990	3559	2663	963	7185
1963	1109	218	234	1237	952	3750	2708	1080	7538
1964	1115	273	132	1456	1088	4064	2983	1084	8131
1965	1184	195	135	1370	996	3930	2863	1181	7974
1966	2503	243	531	1489	885	5651	3887	1089	10627
1967	1936	262	473	1439	1092	5202	4172	1018	10392
1968	2491	219	444	1903	1135	6192	5638	1290	13120
1969	2638	258	537	2515	1172	7120	5605	1300	14025
1970	2298	229	657	2476	1237	6897	6833	1376	15106
1971	2075	338	469	3614	1255	7751	7594	1554	16899

STATEMENT - III

SUPREME COURT OF INDIA

STATEMENT SHOWING INSTITUTION AND DISPOSAL OF CIVIL APPEALS, CRIMINAL APPEALS & WRIT PETITIONS

FROM 1961 TO 1970

1. Institution 2. Disposal
3. Difference of Columns 1 & 2.

\+ Excess of disposal over institution
\- Excess of institution over disposal

Year	Civil Appeals			Criminal Appeals			Writ Petitions			Total		
	1	2	3	1	2	3	1	2	3	1	2	3
1961	633	907	+ 274	197	216	+ 19	384	531	+ 147	1214	1654	+ 440
1962	891	889	- 2	215	309	+ 94	239	344	+ 105	1345	1542	+ 197
1963	1109	797	- 312	218	152	- 66	234	182	- 52	1561	1131	- 430
1964	1115	1055	- 60	273	256	- 17	132	294	+ 162	1520	1605	+ 85
1965	1184	1049	- 135	195	161	- 34	156	131	- 25	1535	1341	- 194
1966	2503	971	- 1532	243	226	- 17	266	215	- 51	3012	1412	- 1600
1967	1936	1057	- 879	262	233	- 29	295	276	- 19	2493	1566	- 927
1968	2581	2374	- 207	292	263	- 29	444	395	- 49	3317	3032	- 285
1969	2712	2046	- 666	262	220	- 42	538	471	- 67	3512	2737	- 775
1970	2313	1752	- 561	234	201	- 33	656	616	- 40	3203	2569	- 634

STATEMENT II

SUPREME COURT OF INDIA

STATEMENT SHOWING INSTITUTION AND DISPOSAL OF SPECIAL LEAVE PETITIONS (CIVIL & CRIMINAL) & WRIT PETITIONS

FROM 1961 TO 1970

1. Institution 2. Disposal + Excess of disposal over institution
3. Difference of Columns 1 & 2 - Excess of institution over disposal

Year	Special Leave Petitions (Civil)			Special Leave Petitions (Criminal)			Writ Petitions Instituted	Writ Petitions Dismissed at preliminary hearing.	Rule Nisi issued.
	1	2	3	1	2	3			
1961	1030	954	- 76	970	945	- 25			
1962	1224	1243	+ 19	990	1048	+ 58			
1963	1237	1221	- 16	952	931	- 21			
1964	1456	1405	- 51	1088	1058	- 30			
1965	1370	1423	+ 53	996	1021	+ 25			
1966	1488	1408	- 80	885	864	- 21	266	157	122
1967	1439	1362	- 77	1092	1040	- 52	295	113	178
1968	1883	1890	+ 7	1162	1092	- 70	444	156	214
1969	2503	2287	-216	1144	1252	+108	538	192	365
1970	2444	2174	-270	1173	1243	+ 70	656	362	254

Statement-VII.

SUPREME COURT OF INDIA

STATEMENT OF CIVIL & CRIMINAL APPEALS SHOWING WHETHER BY CERTIFICATE ETC. OR BY SPECIAL LEAVE

YEAR	CIVIL APPEALS			CRIMINAL APPEALS		
	*By Certificate etc.	By Special Leave	Total	By Certificate etc.	By Special Leave	Total
1968	1955 (70)	626	2581	85	207	292
1969	1590 (24)	1122	2712	41	221	262
1970	1365 (17)	948	2313	31	203	234

* Note: (1) Civil Appeals by Certificate include Election Appeals and Income Tax Appeals.

(2) Figures within brackets show Election Appeals.

a. Practice and Procedure in the Supreme Court.

Under Article 145 of the Constitution the Supreme Court has the power to make its own rules. In 1950[23] the Supreme Court formulated rules similar to those used by the Privy Council, But after changes in 1954,[24] 1959,[25] and 1962,[26] adopted new rules in 1966.[27] The legality of these rules was challenged in Re Lily Isabel Thomas[28] where it was argued that since the Advocates Act 1961 had given the petitioner the right to practise before the Supreme Court, the Court could not impose the restriction that she had to have an office within ten miles of the Court. The Court not only refused to accept that there was a conflict between the Act and the rules[29] but stressed in very broad terms their right to make rules over a large range of subjects. A commentator suggests that the powers are not so wide.[30] But In Re Sant Ram (1960)[31] is an authority for the proposition that the words "practice and procedure" in Article 145 are to be construed in the widest possible sense.[32]

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23. Reprinted from Gazette in (1950) S.C.J. supplement 1-14 dated Jan.28, 1950.

24. See (1954) S.C.J. supplement i-xviii dated Jan.16, 1954.

25. Reprinted from Gazette in (1959) S.C.J. supplement i-xix.

26. Reprinted from Gazette (1962) S.C.J. supplement 40-42, see infra f.n.29.

27. Gazette Extraordinary Pt. II S3(1) 13th 15.1.1966 reprinted (1966) S.C.J. supplement 1-52 reproduced Datta and Agarwala: Practice and Procedure in the Supreme Court of India (1967) App. 1-91.

28. A.I.R. 1965 S.C. 855.

29. Ibid at 859. The rules in question were the 1962 amendment (see supra f.n. 26) Gazette Extraordinary Part II S 3(1) 1308 published Sept. 8, 1962.

30. S.Kumar: Constitutionality of the Supreme Court rules affecting the right to practice A.I.R. 1966 Jnl. 67 at pr.4 p.68.

31. A.I.R. 1960 S.C. 937.

32. Ibid pr.7, 934. Here the Court upheld Or. IV Ar 23-24 S.C. Rules 1950 which prevented bribery of counsel.

The Supreme Court has even assumed the right to organise the Bar. In 1954 the system of agents and Advocates was substituted for one of Advocates on record. At the same time it initiated the practice of recognising Senior Advocates[33] whose position was to be like the Q.C. (in England) who can act only through and with a Junior.[34] But the recognising authority in this case is the judges of the Supreme Court and not a political body like the Lord Chancellor's office.[35] This control of the Supreme Court is not wholly welcome but is to be preferred to control from the Ministry of Law.

The most important change in the Supreme Court rules pertains to the rules about the preparation of the record of a case. In 1950, the Supreme Court adopted the rules of the Privy Council under which after leave to appeal was granted the responsibility for printing the record was left to the High Courts.[36] This was suitable for the Privy Council which sat in England but as the leading authorities on Supreme Court on procedure point out :

> "This division in the procedure resulted in a leisurely pace being adopted; experience disclosed that most of the delays in the disposal of the matters (before the Court) were attributable to this division in the administrative control (of the preparation of the record of a case)." 37

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33. See 1954 Rules (as amended) O IV r. 7 1966 Rules O IV r. 2.

34. Ss 16(3), 52(1) Advocates Act 1961; (1966) S.C.R. O IV r. (2)(b).

35. See (1966) Rules O IV r. 2(a) "The Chief Justice and the judges may, with the consent of the advocate designate an advocate as Senior Advocate if in their opinion by virtue of his ability, experience and standing at the Bar, the said advocate is deserving of such distinction".

36. See (1950) Rules O XVI Note in 1954 r.2 was renumbered r.3A and minor changes were made in rules 3, 5, 6 and 9.

37. Agarwala and Datta (supra f.n.17) p.12.

The 1966 rules lay down that immediately after the grant of a certificate granting further leave to appeal is given, the Registrar of the Supreme Court takes over the responsibility of getting the record of the case printed.[38]

The new rules also introduce other changes to accommodate the pressure of arrears. The 1950 rules fixed the minimum number of judges on a Bench of the Court at three[39]; the new rules have reduced this to two, thus making possible more benches.[40] The powers of a vacation judge have been increased.[41] Further the 1966 rules contain a provision whereby :

> "The Chief Justice may from time to time appoint judges to hear and dispose of all applications which may be heard by a judge in chambers." 42

In the matter of transfer applications the new rules warn :

> "Where the petition is dismissed the Court if it is of the opinion that the application was frivolous or vexatious, may order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding 1000 Rupees, as it may consider proper in the circumstances of the case." 43

The Court is gradually changing its procedure to ensure that it can clear its arrears without incurring any more delays. It has shortened the time limit within which one can present one's appeal to the Supreme

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38. (1966) S.C.Rules O XV r 14 -27; see in criminal matters however O XXI r.17-22.

39. (1966) S.C.Rules O VII r.1.

40. 1950 S.C. Rules O XI r.1. This appears to have helped according to M.H.Beg, Judge of the Supreme Court (personal letter to me dated Feb.12,1971)

41. (1966) S.C. Rules O VII r.4. Vacation judges have tremendous powers as is evident from Sodhi Singh v Delhi A.I.R. 1966 S.C. 91.

42. 1966 S.C. Rules O VII r.3.

43. 1966 S.C. Rules O XXXVI r.4.

Court after the grant of certificate from 90 days to 60 days;[44] this has also been done with respect to the time limit allocated for asking for special leave to appeal.[45]

The major problem however lies in the fact that its jurisdiction is much too wide. In the last 12 years the Supreme Court has tried to give a restrictive interpretation to the provisions relating to its jurisdiction. To this we now turn.

b. The Supreme Court's view of its own Jurisdiction.

The Supreme Court has tried to give a restrictive interpretation to its jurisdiction. It first ruled that the remedy provided in Article 32 is discretionary.[46] But given the fact that the right to move the Court is a fundamental right, the Court came round to the view that the existence of an alternative remedy would not take away the right to move the Supreme Court for the protection of fundamental rights.[47] But gradually arrears started piling up. In 1960 the number of judges in the Supreme Court was increased to cope with the new load.[48] In 1961 the Court disposed of only 531of the 783 Writ Petitions pending before the Court.[49] In that same year, in Daryao v State[50] the Court ruled that a petitioner who had obtained a decision on merit from the High Court under Article 226 could not maintain a petition before the Supreme Court under Article 32. This introduction of the principle of

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44. 1966 S.C. Rules

45. See 1966 Rules O XVI r.1 c.f. 1950 rules O XIII r.1.

46. See Diwan Bahadur v Union A.I.R. 1955 S.C. 1; Baburao v Union A.I.R. 1955 S.C. 257; Laxmanappa v Union A.I.R. 1955 S.C.3.

47. Kochunni v Madras (1959) Supp. 2 S.C.R. 316; Khatak Singh A.I.R. 1963 S.C. 1295; See generally Seervai: Constitutional law of India (1967) 624-5 (hereafter Seervai (1967).)

48. Supra f.n.22.

49. See . Tables showing arrears (supra p.178 ff and infra p.648 ff).

50. A.I.R. 1961 S.C. 1457; see further Seervai (1967) 626-30.

res judicata into this area was novel and was affirmed in 1964.[51] It followed in a sense the view of the English Courts that successive applications of Habeas Corpus cannot be made to the various divisions of the High Court. This view has been recently affirmed by Section 14(2) of the Administration of Justice Act 1960.[52] In 1965 in Devi Lal's case[53] the Supreme Court applied the doctrine of constructive res judicata to successive applications impugning the validity of Sales Tax impositions for the same assessment year.[54] In Tilok Chand Moti Chand v B. H. Munshi (1969)[55] the Court by a 4 : 1 majority applied the doctrine of laches (or delay) to applications under Article 32.[56] This case was followed in Rabindranath v Commr. (1970)[57] where the delay was of 15 years and Sikri J. (delivering judgement for the Court) observed:

> "It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay." 58

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51. Amalgamated Coalfields v Janpada Sabha A.I.R. 1964 S.C. 1013; see also Jaganath Baksh v U.P. A.I.R. 1962 S.C. 1563. But see Gulanchand v Gujerat A.I.R. 1965 S.C. 1153; the earlier decision must be on its merits. See also Joseph v Kerala A.I.R. 1965 S.C. 1514; P.L.Lakhanpal v Union A.I.R. 1967 S.C. 907; V.V.R.Mills v Madras A.I.R. 1968 S.C. 1196. But note Nazrul Ali Molla v W.B. A.I.R. 1969 N.S.C. 182 that a habeas corpus petition to the High Court does not bar one to the Supreme Court. The Court will also not allow Article 32 to be used for purposes other than those connected with fundamental rights (see Gurdev Singh v Punjab A.I.R. 1964 S.C. 1585 (on Article 311 - the rights of civil servants)).

52. See Heuston: Essays in Constitutional law (1961 Edn.) 109-121.

53. A.I.R. 1965 S.C. 1150.

54. See Seervai (1967) 629.

55. (1969) I S.C.C. 110.

56. See Seervai: The Supreme Court, Article 32 of the Constitution and Limitation: Justice reclaims its rights (1969) 71 BomL.R.Jnl. 35-8.

57. A.I.R. 1970 S.C. 470 at pr.32 p.477.

58. Ibid at pr. 34 p.478.

Again with respect to Article 132 of the Constitution in R. D. Agarwala v Union (1971)[59] the Court through Hidayatullah C.J. disapproved of a single judge granting a certificate to appeal direct to the Supreme Court. In doing this his lordship applied the rule contained in Article 133(3) of the Constitution[60]. This decision has been criticised as per incuriam[61] because it ignores Election Commr. v S. Vankata Subha Roa (1953)[62] which specifically lays down that limitations in Article 133 of the Constitution do not apply to Article 132.

The interpretations of Articles 132 and 133 have otherwise been very wide. In Sir Chunnilal Mehta & Sons Ltd. v Century Spg. & Wvg. Co. Ltd.[63] the Court held that the interpretating of a managing agency agreement was a substantial question of law, thus widening the scope of the provisions. But the volume of the appeals was sought to be checked by declaring the principle that if the interpretation of Constitutional matters is well settled, then no substantial question of law is in dispute.[64] In actual fact the number of civil appeals (pending and filed) has increased from 1989 in 1961 to 4094 in 1966. The only way to check this is not by narrowing the interpretation of the phrase "a substantial question of law", because it is only right that the Supreme Court should resolve controversies on doubtful points as soon as possible but by raising the limit for the valuation of property in Article 133 (1)a, as indicated earlier.[65]

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59. A.I.R. 1971 S.C.299.

60. Article 133(1):"Nothwithsanding anything in this article, no appeal shall, unless Parliament by law otherwise provide, lie to the Supreme Court from the judgement, decree or final order of one judge of a High Court".

61. See Seervai: The Supreme Court and Article 132 of the Constitution (1971) 73 Bom.L.R. Jnl. 54-5.

62. A.I.R. 1953 S.C. 210; See Seervai (1967) 1013.

63. A.I.R. 1962 S.C. 1314.

64. See for example on Article 14 J.K. v Ganga Singh A.I.R. 1960 S.C. 356.

65. See supra f.n.5 and text corresponding to it.

The Court has played an important part in Criminal appeals. In this area there have been fewer appeals[66] and fewer reported cases[67] than those under Article 133,[68] and Chief Justice Sikri's hint that Parliament should not have increased their jurisdiction in 1970 seems unjustified in the context of the fact that this is the only area where the Supreme Court has comfortably coped with the volume of cases before it.[69] The Court has always been keen to see that justice is done in criminal cases and where the appellant has not been able to make out an appeal under Article 134 the Court has allowed an appeal to be made under Article 136.[70] Its object is to ensure that criminal procedure is not violated and in one remarkable case where they felt that there had been an injustice they granted a discharge instead of remanding the case.[71] But by and large the Court does not go into questions of fact under Article 134[72] (unless the guilt of the accused is questionable[73])

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66. See supra tables showing arrears.

67. There are between 1950-1970 115 cases reported on Article 133 and 54 on Article 134. Source: calculated from the A.I.R. 1950-1970 S.C.

68. See supra Tables showing arrears.

69. Though some arrears seem to arise in this area too. See Table on arrears (supra) for January 1972, infra p. 658.

70. See Haripada Dey v W.B. A.I.R. 1957 S.C. 757; Achuyut Adhicary v W.B. A.I.R. 1963 S.C. 1039.

71. Ramayya v Bombay A.I.R. 1955 S.C. 287.

72. See e.g. Lachman Singh A.I.R. 1952 S.C. 167; Rameshwar Bhatia v Assam A.I.R. 1952 S.C. 405; Virendrajit v Bombay A.I.R. 1953 S.C. 247; Damodran v T.C. A.I.R. 1953 S.C. 463; Adbul Ghani v M.P. A.I.R. 1954 S.C. 30; Moti Das v Bihar A.I.R. 1954 S.C. 657; Narian v Punjab A.I.R. 1956 S.C. 322; Mathew v T.C. A.I.R. 1956 S.C. 241; Badri v Bihar A.I.R. 1958 S.C. 953; Narayan Das v W.B. A.I.R. 1959 S.C. 1118; Mohd. Dastgir v Madras A.I.R. 1960 S.C. 756; Deep Chand v Rajasthan A.I.R. 1961 S.C. 1527; Bakshish Singh v Punjab A.I.R. 1967 S.C. 752; L.Choraria v Maharashtra A.I.R. 1968 S.C. 938; Om Prakash v Haryana A.I.R. 1970 S.C. 654.

73. See Hate Singh Bhagat Singh v Punjab A.I.R. 1953 S.C. 468; Raja Khima v Saurashtra A.I.R. 1956 S.C. 217; Maharashtra v M.H.George A.I.R. 1965 S.C. 722.

or 136,[74] though there are exceptional cases where the Court has been known to interfere.[75] In one case it refused to interfere where there had been a delay of one year and ten months in disposing of an appeal for special lease.[76] It is not a substitute for the Division Bench of a High Court.[77]

The recent enlargement of its jurisdiction which gives the Court the right to interfere in all cases where the High Court gives a punishment of ten years or more of life imprisonment by reversing an acquittal or in a case it has withdrawn to itself, is a good measure.[78]

It is under Article 136 that the Court has an almost unlimited jurisdiction, covering almost every conceivable area of law. Between 1950-1970 the All India Reporter records 387 cases under Article 136 as against 112 on Article 32, 115 on Article 133 and 54 on Article 134.[79] But in recent years the number of civil appeals filed are exceeding the total number of special appeals.[80]

From the very beginning the Court has given a very wide interpretation to Article 136, which begins with a non obstante clause suggesting a very wide jurisdiction.[81]

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74. See f.n. 86.

75. See Moti Singh v U.P. A.I.R. 1959 S.C. 900; Chikkrange Gowda v Mysore A.I.R. 1956 S.C. 731; Niranjan Singh v U.P. A.I.R. 1957 S.C. 142; Shambhu Nath v Bihar A.I.R. 1960 S.C. 725; Bhagwan Das v Rajasthan A.I.R. 1957 S.C. 589; Pandurang v Hyderabad A.I.R. 1956 S.C. 216 (a death sentence case); Anant v Bombay A.I.R. 1960 S.C. 500; Raghava v U.P. A.I.R. 1965 S.C. 75; Hazara Singh v U.P. A.I.R. 1969 S.C. 951 (per Sikri J.) where sentence reduced to life imprisonment because intent was lacking.

76. Bhagwati J. in Bissu v U.P. A.I.R. 1954 S.C. 714.

77. Kalawati v H.P. A.I.R. 1953 S.C. 131; M.P. v Ramakrishna A.I.R. 1954 S.C. 20. Madras v Guruviah Naidu A.I.R. 1956 S.C. 158.

78. See supra f.n. 8.

79. Extracted from the A.I.R. volumes.

80. See Tables on arrears supra, and infra Appendix II.

81. See Bharat Bank v Employees A.I.R. 1950 S.C. 188.

The Court described the nature of this power in Dharkeshwari Cotton Mills v C. I. T.[82] where it observed :

> "It is not possible to define with any precision ... the limitations on the exercise of the discretionary jurisdiction vested in this Court by the constitutional provision made in Article 136. The limitations, whatever they may be, are implicit in the nature and the character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. Behond this it is not possible to fetter the exercise of this power by any set formula or rule.
>
> All that can be said is that the Constitution having trusted the good sense of the Judges of this Court in this matter, that itself is a sufficient safeguard and guarantee that the power will be used to advance the cause of justice and that its exercise will be governed by well-established principles which govern the exercise of overriding constitutional powers. It is, however, plain that when the Court reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of this article is that it is the duty of this Court to see that injustice is not perpetrated by decisions of Courts and tribunals because certain laws have made the decisions of these Courts or tribunals conclusive." 83.

The Court has given a very wide interpretation to the word "tribunal" which includes the Central Government when it gives an order directing a Company to transfer certain shares.[84] There are some restrictions however and the Court has declared that the test to be followed is that the body must be invested with a part of the judicial power of the State. Thus a customs officer acting under Section 167 of the Sea Customs Act is not a "tribunal" even though he must act judicially.[85]

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82. A.I.R. 1955 S.C. (65)

83. Ibid at pr.7 p.69. See also the Privy Council and Federal Court position which was not expressed so widely. Kapildeo Singh v K.E. A.I.R. 1950 F.C. 80; Smt Bibhabati Devi v Ramendra Narayan Roy A.I.R. 1947 P.C. 19

84. See Harinagar Sugar Mills v Shyam Sundar A.I.R. 1961 S.C. 1649; Note the dissent of Hidayatullah J.

85. Indo China Steam Navigation Co. Ltd. v Jasjit Singh A.I.R. 1964 S.C. 1140.

The limitations that the Court has imposed in a large number of cases are that it will not normally go into concurrent findings of fact[86] unless there is a grave miscarriage of justice.[87] The Court will

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86. See Seervai (1967) 1018 f.n.44 and add the following recent case law: T.I.S.C.O. v Madras A.I.R. 1966 S.C. 380; Union v W.P.Factories A.I.R 1966 S.C. 395; M.P.Industries Ltd. v Union A.I.R. 1966 S.C. 671 (no valid ground for decision by Government); Jasjit Singh v Kartar Singh A.I.R. 1966 S.C. 773; Sri Sita Ram Sugar Mills v Workmen A.I.R. 1966 S.C. 1670; Abdul v Bhawani A.I.R. 1966 S.C. 1718; Sita Ram v U.P. A.I.R. 1966 S.C. 1906 (decision by majority 2:1); I.T.Commr. v Canara Bank A.I.R. 1967 S.C. 417; Lloyds Bank Ltd. v Pannalal Gupta A.I.R. 1967 S.C. 428 (on the status of a workman); Charan Singh v U.P. A.I.R. 1967 S.C. 520; G.Tabbaya v Jagapathiraju A.I.R. 1967 S.C. 647; Gomathinayya Pillai v Palaniswami A.I.R. 1967 S.C. 868 (2:1); Hindustan Antibiotics v Workmen A.I.R. 1967 S.C. 948; Ratilal Bhanji v Asst.Customs Collector A.I.R. 1967 S.C. 1639; Union v Indian Sugar Mills Assn. A.I.R. 1968 S.C. 22; N.E.Industries v Hanman A.I.R. 1968 S.C. 33; Madras v Habibur Rahman & Sons Ltd. A.I.R. 1968 S.C. 339; Thanappa Chettiar v Karuppa Chettiar A.I.R. 1968 S.C. 915; Karnesh Kumar v U.P. A.I.R. 1968 S.C. 1402; Kishan Chand v S.T.A. A.I.R. 1968 S.C. 1461; Ashiq Miyan A.I.R. 1969 S.C. 4; (where there is no legal error the Court will not interfere); Narbada Prashad v Chagan Lal A.I.R. 1969 S.C. 395; Union v M.P.Sugar Mill A.I.R. 1969 S.C. 630; Brook Bond Ltd. v Chandranath A.I.R. 1969 S.C. 992; U.P. v Harish Chand A.I.R. 1969 S.C. 1020; Mudigowsa v Ram Chandra A.I.R. 1969 S.C. 1076; Workmen v M.I.Co. A.I.R. 1969 S.C. 1280; Kartar Singh v Chaman Lal A.I.R. 1969 S.C. 1288; J.Lakshmi Bai v P.Appa Rao A.I.R. 1969 S.C. 1355; Mst. Harkho v Bedariya A.I.R. 1969 N.S.C. 19; Lachman Das v Punjab A.I.R. 1969 N.S.C. 172; Bihar v Nathu A.I.R. 1970 S.C. 27; Hussain Umar v Dalip Singhji A.I.R. 1970 S.C. 45; Digvijay v Pratap Kumar A.I.R. 1970 S.C. 137; K.Krishna Chettiar v Ambal & Co. A.I.R. 1970 S.C. 146; Gaziabad Eng.Co. v Workmen A.I.R. 1970 S.C. 390; C.Rly.Workshop Union v Vishwanath A.I.R. 1970 S.C. 488; Agra Electric Supply Co. A.I.R. 1970 S.C. 512; Vallabh Das v Madan Lal A.I.R. 1970 S.C. 987; U.P.Mines v R.B.S.Durga Prashad A.I.R. 1970 S.C. 1025; Lala Prashad v Hari Ram A.I.R. 1970 S.C. 1093; U.P.S.W.Corpn. v C.K.Tyagi A.I.R. 1970 S.C. 1244; Hargun Sundar Das v Maharashtra A.I.R. 1970 N.S.C. 1514; Tapinder Singh A.I.R. 1970 S.C. 1566 (facts of no consequence); Rustam & Hornby Ltd. v Z.Englo A.I.R. 1970 S.C. 1649.

87. On the general rules regarding interference in criminal matters see Sarvana Bhavan v Madras A.I.R. 1966 S.C. 1273 (note the dissent of Wanchoo and Ramaswami JJ.) Siddamma Apparao v Maharashtra A.I.R. 1970 S.C. 977 (dismissal of workmen improper); Govind v Maharashtra A.I.R. 1970 S.C. 1033; Rajasthan v Harkar Singh A.I.R. 1970 S.C. 1304 (where the Court appraised the evidence); Budh Sen v U.P. A.I.R. 1970 S.C. 1321. See also f.n. 72 supra.

also not allow new pleas to be raised for the first time,[88] except in special cases.[89] But within these limitations its powers are very wide indeed and cover vast areas of industrial law (as we shall see later).[90] Its interpretation of miscarriage of justice, though arbitrary, is very wide.[91]

In a recent visit to England the Chief Justice of India informed an academic gathering that arrears in the Allahabad High Court have piled up to 80,000 cases.[92] He feared that the Supreme Court might

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88. See Seervai (1967) 1019 f.n. 54. Add the following recent cases : Cantonment Board v Pyare Lal A.I.R. 1966 S.C. 108; S.Asia Industries v Sarup Singh A.I.R. 1966 S.C. 346; Hindustan Antibiotics v Workmen A.I.R. 1967 S.C. 940; Kamani Metal Alloys Ltd. v Workmen A.I.R. 1967 S.C. 1175 (stressed that appeal was not on every point of law); K.Kumar v J.K. A.I.R. 1967 S.C. 1368; I.T.Commr. v Hukum Chand A.I.R. 1967 S.C. 1907; M/S Dabur Deoghar v Workmen A.I.R. 1968 S.C. 17; Union Co-op Ins. Soc. v I.T.Commr. A.I.R. 1968 S.C. 78; Ragho Prashad v Sri Krishna A.I.R. 1969 S.C. 316; Mysore v Achiah Chetty A.I.R. 1969 S.C. 477; P.R.K.S.Works v Land Reforms Commr. A.I.R. 1969 S.C. 897; Lachmanndas v Jalalabad Mun. A.I.R. 1969 S.C. 1126; Athani Mun. v Labour Court A.I.R. 1969 S.C. 1335; Ram Gopal v M.P. A.I.R. 1970 S.C. 158; Dhian Singh v Saharanpur Mun. A.I.R. 1970 S.C. 318; Sitabai v Ramchandra A.I.R. 1970 S.C. 343; C.I.T. v N.Behari A.I.R. 1970 S.C. 388; S.T.Commr. v M.P.E.B. Jabalpur A.I.R. 1970 S.C. 732;Assam v M.K.Das A.I.R. 1970 S.C. 1255; Kalaji Tamasappa v Khyanegouda A.I.R. 1970 S.C. 1420; Premlata v Lakshman Prashad A.I.R. 1970 N.S.C. 1525; Murtaza & Sons Ltd.v Nazir Mohd. A.I.R. 1970 S.C. 668 (the entire case is not at large).

89. See B.K.Bhandar v Dhanmangaon Mun. A.I.R. 1966 S.C. 249 (the new plea was important) Hiralal v Kasturbhai A.I.R. 1967 S.C. 1853 (the Court considered an obvious point, which was missed in the Court below); State Bank, Hyderabad v V.A.Bhinde A.I.R. 1970 S.C. 196 (limitation plea allowed as no fresh facts had to be investigated); Contrast Madan Lal v Punjab A.I.R. 1970 S.C. 1590 (plea based on fresh facts not be be investigated).

90. supra 609 On procedural matters see Laliteshwar Prashad v Baleshwar Prashad A.I.R. 1966 S.C. 580 (that the Representation of Peoples Act 1951 does not restrict Article 136); Master Const.Co. v Orissa A.I.R. 1966 S.C. 1047 (Article 136 can apply even if Article 226 is not availed of); Sirpur Paper Mill v W.T.Commr. A.I.R. 1970 S.C. 1520 (appeal maintainable even where normal procedure bypassed). But see O.N.Mohinder v Bar Council A.I.R. 1968 S.C. 888 (where alternative right to appeal not exhausted); N.R.Co-operative Society v Ind.Trib. A.I.R. 1967 S.C. 1182 (order in Writ petition not appealable).

91. See supra f.n. 71, 87, 89.

92. Lecture at the Institute of Advanced Legal Studies June 21, 1971.

find itself in the same boat. The judiciary has been called India's most successful nationalised Industry.[93] As more and more cases get filed before the Courts this industry will flourish more and more, but it will do so without ensuring that it fulfills the function which the judiciary set out to serve. This malaise seems to have reached the Supreme Court of India. One judge suggests that the Supreme Court decide only constitutional cases on the American pattern,[94] but this would in fact mean going back to the Federal Court's function, which would be too narrow. Meanwhile an Arrears Committee has been set up under Ex-Chief Justice Shah.

The pressure of arrears is tremendous and must be kept in mind when we consider the special problems selected for study.

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93. A. Gledhill in I.C.L.Q. Supp. No. 8. p. 8

94. M.H.Beg, Supreme Court Judge. Personal letter to the author dated Feb.14, 1972. (But he discussed other schemes as well, while recognising the defects of his own suggestion).

CHAPTER III

THE SUPREME COURT AND THE RIGHT TO PROPERTY

1. Areas of controversy - The alleged political bias.

Two main criticisms have been levelled against the Supreme Court :

1. Its decisions are of a political nature.

2. It has followed Anglo-American Common Law ideas rather than catered for Indian habits and needs.

The first is a popular criticism of the Supreme Court made by politicians[1] and others[2]. Lawyers too have assumed that the Court must either be "right" or "left" wing and that the Constitution can be interpreted in either of these two ways. Indeed one writer has made the "right" wing attitudes of the Court the subject of a doctrinal dissertation.[3] The reason why this argument had acquired credibility is because the lawyer, prompted partly by the text of the Constitution and partly by the need to give his arguments a cosmopolitan objectivity, uses western political terminology. This is evident from the discussions on property before Independence[4],

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1. e.g. During the debate on the Fourth Amendment Bill e.g. (1955) L.S.D. Vol.II Pt.II p.1949; during the debate on Nath Pai's Bill to Amend the Constitution (1970) Fourth Series Vol.36 No.10 col.241-329. Note however M.Desai M.P.'s comment on the Bank Nationalisation case (R.C.Cooper v Union A.I.R. 1970 S.C. 564) as "one of the most learned judgements ever seen in the world" (at col.283). Politicians are responsible for drawing the Supreme Court into the arena of political controversies.

2. e.g. Government Publication: The Second Five Year Plan (1956 Delhi) 18; Freidman: Joint International ventures in India (1959) 39; D.E.Smith: Nehru and Democracy (1958) 141; Merrillat: A historical footnote to Bela Banerjee's case ... (1959) I J.I.L.I. 183 at 184 (f.n.) citing the above refs.

3. H.M.Jain: The right to property (1968 Allahabad) e.g. at 151 (hereafter cited as H.M.Jain (1968)). See an illuminating though very brief criticism of the political tone of the book by Derrett: (1969) 18 I.C.L.Q.511 at 512.

4. See for example the Karachi Resolution (1931); The "Simon" (Indian Statutory) Commission Report (1930) Vol.II (Cmd.3569) at 36 were against the Bill of Rights "Experience has not shown them to be of great political value"; this enhanced their political importance and they were considered in the Report of the Joint Committee on Indian Constitutional Reform (1934) Vol.I, Part I (H.C.5; H.L.6) pr.336-372; S.299 of the Government of India Act 1953 therefore incorporated the right to Property. For the background discussion see Hansard (1934-5) 300 H.C.D. (Fifth Series)1071-90. See also Merrillat: Land and the Constitution in India (1970) 37-51; (hereafter cited as Merrillat (1970)): H.M.Jain (1968) 10-23.

in the Constituent Assembly[5], and in the articles and text books written by lawyers[6] and judges[7] after Independence.

But the charge of "political bias" overlooks the fact that the Supreme Court has not in fact invalidated many statutes on the grounds that they violate the provisions relating to Property rights. In 1960 an American observer was surprised to find that in the field

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5. The main discussion is at IX C.A.D. 1191-1311. But see also the earlier discussion at VIII C.A.D. 508-518 where only the abolition of Zamindari is discussed. See further Merrillat (1970) 51-78; H.M.Jain (1968) 24-56; G.Austin: The Indian Constitution (1966) 84-101.

6. See for example Gyan Prakash: Our Constitution and the right to Equality, Liberty and Property (1950) 52 All.L.J.Jnl. 5; K.Venkoba Rao: Liberty and Social Control (1953) S.C.J. Jnl. 203 at 205 (on police power and the right to property); M.K.Nambiyar: American borrowings in the Indian Constitution (1954) S.C.J. Jnl. 151; Debi Prashad: A peep into the philosophy of law A.I.R. 1955 Jnl. 78; T.K.Tope: The Supreme Court of India and the right to property (1955) 57 Bom.L.R. Jnl. 67; V.G.Ramachandran: Principles of Property Rights and the social structures of States in the world (1959) S.C.J. Jnl. 1; G.V.Venkata Subha Rao: Vicissitudes of property as a Fundamental Right in Studies in law (1960 A.P.H.) 177; Ibid: Indian Constitutional law (1971) Vol I 379-392; H.R.Ursekar: Fundamental Rights (1960) 62 Bom.L.R.Jnl. 129; B.K.Sharma: A pragmatic evaluation of Fundamental Rights (1960) S.C.J. Jnl. 18; P.S.Chaudhri: Fundamental Rights in the Indian Constitution A.I.R. 1962 Jnl. 28, 33; D.C.Jain: Concept of property and the Supreme Court A.I.R. 1964 Jnl. 6; Surya Kumar: Right to property and public purpose (1968) Indian Advocate 39; R.C.Hingorani: Concept of Property as a Fundamental Right A.I.R. 1959 Jnl. 28 = (1958) S.C.J. Jnl. 199; Jagat Narain: The Indian Supreme Court and Property Rights...(1968) III Journal of Law and Economic Dev. 147-80; G.C.Venkata Subharao: Property Rights and the 25th Amendment (1972) I S.C.J. Jnl. 1-9 (but note emphasis on Hindu approach at pp.8-9); V.G.Ramachandran: People of the Indian Nation v The Judiciary and Parliament (1972) I S.C.J. Jnl. 9-14.

7. More recently judges seem to have come out into the open to discuss more freely their views on the right to property. For a defence of the Supreme Court's position see K.Subha Rao: Our Constitutional Problems (1970) Chapter II; The Right to Property in the Indian Constitution (Shroff Memorial Lecture) rep. (1969) I S.C.W.R. Jnl; Hidayatullah: The Constitution, Parliament and the Court (1972 Sri Ram Memorial Lecture) who is of the opinion that the right to property ought not to have been included in the Constitution but since it was the Court was bound to protect it. Gajendradkar, however, delivering the Tagore Lectures on Indian Parliament and Fundamental Rights (1972)(see National Herald Feb 26,1972, Feb 23,1972) has criticised the Supreme Court for forcing Parliament to amend the Constitution.

of agrarian reform the Court has invalidated only one such statute.[8] In the Table below is given an estimate of the extent to which the Supreme Court has invalidated statutes as ultra vires Property rights and the number of votes cast for or against the validity of a statute.

TABLE I showing the extent to which the Supreme Court has declared statutes ultra vires property rights.

Date	Total no. of cases on Property	Cases where statute ultra vires	% of 3 : 2	No. of vote	For	Against
1950-54	22	7	31.8	118	81	37
1955-59	30	2	6.67	171	159	12
1960-70	147	23	16.3	696	568	128
Totals	199	32	16.84	985	808	177

Source: Calculated from the A.I.R.(Supreme Court) 1950-1970

As the Table shows, the Court has not embarrassed the Government by declaring Property rights ultra vires the Constitution, even though they have assumed controversial positions on various aspects of property rights which have caused alarm and led to Constitutional Amendment[9], and

8. Merrillat: A historical footnote to Bela Banerjee's case (1959) I J.I.L.I. 183 at 184 citing Rajasthan v Nath Mal A.I.R. 1954 S.C. 307. He overlooked the fact that vital sections in the Bihar Land Reform Act 1950 were struck down in Kameshwar v Bihar A.I.R. 1952 S.C. 252 and that a statute was declared unconstitutional in Raghubir v Court of Wards A.I.R. 1953 S.C. 373. But his statement is by and large accurate. The Court began to make its presence felt in the area of agrarian reform only after Kochunni v Madras A.I.R. 1960 S.C. 1080 (the significance of which will emerge later in this Chapter).

9. The First, Fourth and Seventeenth Amendments (1951, 1954, 1964) were caused by decisions of the Courts. These are discussed in their appropriate places later.

forced the Court into declaring that the Government does not have the power to amend Fundamental Rights,[10] But the Court's approach suggests that it is chagrined more by the fact that the Amendments are deviations from the principles of cosmopolitan jurisprudence and deprive them of the power of review, rather than the fact that they might be of a political nature. To understand the Court's attitude we have to look to the problem of interpreting a Western theory of property in an Indian context, rather than allege the Court's political bias.[11]

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10. This was done by a 6:5 majority in Golak Nath v Punjab A.I.R. 1967 S.C. 1643 (for extrajudicial comments on this see f.n.7. The case is discussed more fully in Chapter VII).

11. The Court has rarely used the language of politics. A stray example is Gajendragadkar C.J.'s suggestion in Akadasi Paladan v Orissa A.I.R. 1963 S.C. 1047 at pr.14 p1053 that the 1st Amendment Act was ideologically motivated.

2. The Western and Indian theories of Property - A conflict between modernity and tradition.

There is a difference between the Western concept of Property, as it evolved after the Protestant and commercial revolutions in the sixteenth century,[1] which is embodied in the Constitution, and the Indian concept of Property which governs Indians in their day to day relationship. The former treats property as if it were "owned" exclusively by a person, while the latter thinks of "ownership" as a limited right conditioned by other rights and claims which operate simultaneously on the same property.

i(a). The development of Common Law ideas on Property.

In the reign of Elizabeth I, the State controlled every portion of the body-politic and every aspect of the individual's life, liberty and property. There was control on the price of foodstuffs, internal trade, the price of sugar and wine, the import of wool[2] and to some extent even the morals of the people. In Darcy v Allein (1602)[3] the major reason given for the Crown's need to control the monopoly of playing cards was the hope that

> "servants and apprentices might apply themselves to more lawful and necessary trades" 4

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1. For a general account of this development see Tawney: Religion and the rise of capitalism (1926). It must be noted that before the 16th century Roman law did think of ownership in a limited sense, see Roscoe Pound: V Jurisprudence (1959) 123-4. In English law equitable rights which operate simultaneously as legal rights are not regarded as rights of ownership strictu sensu.

2. See generally Holdsworth: IV History of English law (hereafter H.E.L.) 301-2, citing from I Tudor and Stuart Proclamations.

3. (1602) Coke Reports 84 (or Vol. VI Coke Reports (1826) 159).

4. Ibid at 84 b (and 159). See also p.85 b (and 161).

But behind all this control - most of it ineffective - new attitudes to property were emerging, to suit the merchants' need. For instance, the law of Contract was gradually emerging as a separate branch of law. As an eminent legal historian puts it :

> "(The) Actions of detinue, trover and Trespass were giving rise to more definite rules as to the rights of the owners and possessors of chattels ... It is clear ... that a law of personal property was being gradually disengaged from the law of Tort and this development was assisted by two related causes (i) the growth of the law of Contract and (ii) the growth of jurisdiction of the Common law Courts." 5

The lawyer and merchant made a political alliance,[6] developed a political theory of possessive individualism,[7] forced the King to accede to their request that he would not grant further monopolies,[8] and in two well known cases[9] complained that the Sovereign could not by prerogative alone tax a citizen under the disguise of upholding public interests. The Indian lawyer today is trying to play a similar role though in a different context.

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5. Holdsworth: V H.E.L. 417; see generally the Chapter on English, Commercial and Maritime Law V H.E.L. 102-154.

6. Note Hakewill's comment in the House of Commons on the Case of Impositions (Bates Case) (1606) II State Trials 371 "If anyone should be free amongst us it should be the merchant" (quoted at c p.374); Again Coke when presenting the Petition of Right (1627) prophesied that "the high talents and low ambitions of future lawyers will counteract against the excesses of the royal prerogative" (quoted at (1606) II State Trials 371 at 374). See also the Petition of Right (1628) Sections I and II.

7. See the provocative thesis of Macpherson: The philosophy of possessive individualism - A study of political theory from Hobbes to Locke (1960)

8. See Darcy v Allein (1602) see supra f.n.3 at p.88 a (161)

9. The case of impositions (Bates Case) (1606) II State Trials 371 and R v Hampden (The Shipmoney case) (1637) III State Trials 826-1316 (giving a full account of the proceedings).

Out of this jumble of mercantilism, law and politics, three points of law emerged :

1. Property cannot be taken without the authority of Parliament[10] (This was embodied in Article 31(1) of the Constitution).

2. No taxes will be levied without the authority of Parliament.[11] (This was embodied in Article 265 of the Indian Constitution).[12]

3. There will be a presumption that compensation will be paid when property will be acquired by a statute. (This is embodied in Article 31(2) of the Constitution).

The last mentioned proposition, which was evolved in the nineteenth century as an aid to Statutory Interpretation,[13] but soon became an established principle of Constitutional and public law under the general doctrine of "Eminent Domain" which lays down that property cannot be acquired except for a public purpose and on payment of compensation. The recent case of Birmingham City Corporation v West Midland Baptist (Trust) Assn. Inc. (1969)[14] affirms that this is still an important part of Planning Law.

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10. See Re De Keysers Hotel (1919) I Ch.197 (C.A.)

11. See IV Holdsworth 104-5.

12. This idea was later expanded in Moopil Nair v Kerala A.I.R. 1961 S.C. 552.

13. See Brett M.R. in Att.Gen. v Horner (1884) 14 Q.B.D. 245 at 257 confd. on appeal (1886) 11 A.C. 66; Davey L.J. in Commr. of Public Works v Logan (1897) A.C. 176 at 188; Jorgeson v Sutton Gas Co. (1898) 2 Ch. 614 at 621; L & N W Rly. v Evans (1893) 1 Ch. 28. In Newcastle Breweries v R. (1920) 1 K.B. 854, Salter J. relying on the above mentioned cases observed "It is an established rule a statute will not be read as authorising the taking of a subject's goods without payment, unless an intention to do so can be clearly expressed..." This rule must apply no less to partial than to total confiscation and it must apply a fortiorari to the construction of a statute delegating legislative powers .."

14. (1969) 3 All.E.R. 172

These principles were transmitted to America where they acquired the status of "Constitutional Principles".[15] But the need for the Courts to protect property was not felt till the passing of the Fourteenth Amendment. Story's editor, writing in 1873, thought the right to property fundamental,[16] but observed

> "(P)ublic lands hold out, after the discharge of the national debt, ample revenues to be devoted to the cause of education and sound learning and to internal improvements without trampling on property or embarrassing the pursuits of people by hard income taxation." 17

But, he insisted that the property be acquired for public purposes and on payment of compensation,[18] talked against control by the Government[19] and accepted the need for police powers to preserve public health and morality only because they were only incidentally injurious to property.[20]

But the Supreme Court was at first not willing to accept arguments based on a substantive theory of "due process"[21] which would enable them to arbitrate on merits between claims between the State and the individual. In the Slaughter House cases (1873)[22] only the minority judge was willing to evolve principles of substantive due process. In

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15. The last clause of Amendment V to the American Constitution reads "...(N)or shall property be taken for public use, without just compensation."

16. Story: II Constitution of the United States (1873) 4th Edn. Edited by Cooley S.1951 p.669.

17. Ibid at S.1327 p.199.

18. On Article V of the Constitution at S.1720 p.547 referring to Kent II Commentaries Lect. 24 p.275, 276 (2d. pp.339-40); Wilson III Law Lectures 903; Blackstone I Commentaries 138-140.

19. Ibid: S.1790 p.459.

20. Ibid: S.1954 p.672.

21. Note however Taney C.J.'s comments in the controversial Dred Scott case (1954). 19 How. 393 and the case Hepburn v Griswold (1870) 8 Wall, 603.

22. (1873) 16 Wall. 36 (The minority judge was Bradley J.).

Munn v Illinois (1877)[23] the Court told litigants that if they wanted to reduce the maximum storage charges of grain, they must "resort to the polls, not the Courts". In Mugler v Kansas (1887)[24] the Court accepted the substantive "due process" argument while considering a prohibition statute and in Allegeyer v Louisiana (1897)[25] they actually invalidated a statute on substantive due process grounds. After this there followed a spate of litigation on socio-economic matters (of which the famous case of Lochner v N.Y.[26] is a typical example). By one estimate, between 1868 and 1927 there were 248 cases of this type considered by the Court, which invalidated statutes in only 28 cases (6 before 1911 and 13 before 1920).[27]

A writer in 1919, commenting on this development, has remarked:

> "The direct appeal to property and due process has for the most failed ... The indirect appeal through liberty is still going on ... (but) is dying." [28]

The development of the concept of substantive due process in the Supreme Court resembles only too well a similar development in the Indian Supreme Court while considering whether the concept of reasonableness in Article 19(5) of the Constitution should be generally applied to any infringement of the right to property. What inspired this development in both cases was the Court's desire to evolve principles whereby they can protect the right to property against unreasonable State interference.

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23. (1877) 94 U.S. 113.

24. (1887) 123 U.S. 623.

25. (1897) 165 U.S. 578.

26. (1905) 198 U.S. 45.

27. R.A.Brown: Due process, police power and the Supreme Court (1927) 40 Har.L.Rev. 943 at 944-5 (see the chart at f.n.14 p.945); see also Charles Warren: The progressiveness of the United States Supreme Court (1913) 13 Col.L.Rev. 294. For Indian accounts of this development see Paras Diwan: Nationalisation and the Supreme Court (1953) S.C.J. Jnl. 21; P.K.Tripathi: Directive Principles of State policy...(1954) S.C.J. Jnl. 7-46.

28. C.M.Hough: Due process of law today (1919) 32 Har.L.Rev. 218 at 233.

The desire to protect "property" stems from the belief that a person owns a "thing" exclusively and his rights should not be interfered with by anyone, including the Government. Even in more recent times the Common Law has only reluctantly recognised the need to protect the interests of persons other than the owner of property. Thus Courts are beginning to afford some kind of protection even to a trespasser on another's land;[29] restrictions have been put on the doctrine of "caveat emptor" (buyer beware) and the seller has been forced to recognise the rights of a prospective buyer,[30] and the categories of negligence have been extended so that a person has been forced to acknowledge a general duty of care[31] to others for kinds of loss other than pure economic loss.[32]

b. Juristic connotations of this development.

But despite these changes, the basic juristic attitude is still to treat "Ownership" as giving absolute rights to the owner. This attitude can be traced in nineteenth century descriptions of ownership. Thus Austin defined property as :

> "a right infinite in point of user, unrestricted in point of disposition and unlimited in point of determination, over a determinate thing." 33

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29. See Occupiers Liability Act 1957; Videan v B.T.C. (1963) All.E.R. 860; Commr. Rlys. v Quinlan (1964) 1 All.E.R. 897; Goodhart: An infant trespasser on railways lines (1963) 79 L.Q.R. 596; An adult trespasser on railways lines (1964) 80 L.Q.R. 559. For recent developments see Herrington v British Railways Board (1972) 2 W.L.R. 537 (H.L.); Pannett v P.McGuiness & Co. Ltd. (1972) Times Apr.18,1972 p.7 (C.A.).

30. The most notable extension the Misrepresentation Act 1967 should be read in the context of Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. (1964) A.C. 465.

31. Donoghue v Stevenson (1932) A.C. 562.

32. See Weller & Co. v Foot & Mouth Research Institute (1965) 3 All.E.R. 560; World Harmony (1965) 2 All.E.R. 139; Electrochrome v Welsh Plastics (1968) 2 All.E.R. 205; British Celanese Ltd. v A.H.Hunt (1969) 1 W.L.R. 959; S.C.M.(U.K.) Ltd. v W.J.Whitall & Co.Ltd. (1970) 1 W.L.R. 1017.

33. Austin: II Jurisprudence 790.

In actual fact Austin, a Chancery lawyer, should have realised that property, in fact full ownership, of this sort, hardly ever exists, and that mortgages and trusts create rights which do not constitute ownership but are nonetheless property rights.[34] Ownership became an exclusive "power" and not just a component description of various rights an owner enjoyed. As an American jurist puts it :

> "The classical view of property as a right over things resolves it into component rights such as jus utendi, jus dispondendi, etc. But the essence of private property is the right to exclude others." 35

This approach became manifest in all the nineteenth century civil codes like the Prussian Civil Code (1794); the French Civil Code (1804); the Austrian Civil Code (1871); the Californian Code (1872).[36] In the twentieth century codes however a different pattern emerges. The German Civil Code (1900) defined ownership as follows :

> "The owner of a thing may in so far as the law or the rights of third parties admit deal with a thing as he pleases and exclude others from any interference with it." 37 (emphasis mine).

This is also reflected in the opinions of jurists.[38]

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34. See Noyes: Institution of Property (1936) 305; Paton: Meaning of property (1944) 22 Can.B.Rev.720; Lawson: The law of Absolute ownership and division of ownership in Kiralfy (Ed.) British legal papers (1959)3.

35. Morris Cohen: Property and sovereignty (1927) 13 Cornell L.Q. 8 at 12; See also O.W.Holmes Jnr.: The Common Law (1881) 246; Blackstone: I Commentaries 138; R.Pound: The law of property in recent juristic thought (1939) 25 Am.B.A.J. 993 at 997.

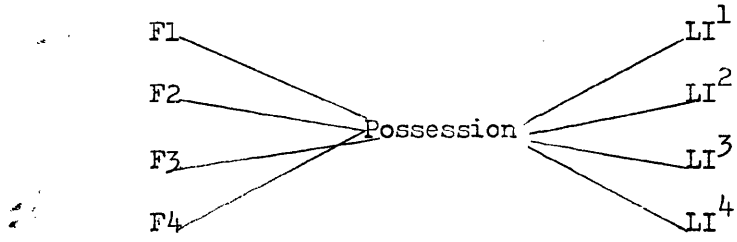
36. See generally Roscoe Pound: V Jurisprudence (1959) 121-3 - Prussian Civil Code (1794) Pt.I, Tit.8 pr.1; French Civil Code (1804) Art.544; Austrian Civil Code (1811) Sec.354; California Code (1872) pr.654. Pound quotes the text of all the codes.

37. (1900) pr.903. See also the Swiss Civil Code (1912) pr.641 "The owner of a thing has the right within the limits of the law to dispose of it at will. He has the right to demand it back from anyone who wrongfully retains it and to take measures to prevent any unlawful interference with it." (emphasis mine).

38. See Pound: V Jurisprudence (1959) 12; Keeton: Elementary Principles of Jurisprudence (1949; 2d.) 172.

At the same time, jurists began to realise that there was a juristic need to recognise that there were many proprietary rights of a partial nature. This led to the development of a new concept of "possession".[39] Possession began to be treated not as a second cousin to "ownership", but rather as a general description which covers a variety of legal concepts defining the legal consequences that result from particular factual situations. This has been explained in a diagram by an Australian jurist.[40]

Diagram



F1 - F4 = varied specific factual situation; LI^1 - LI^4 = varied legal incidences which result from the factual situations. Thus varied factual situations which describe the relationship between a person and property have varied legal connotations. This idea certainly militates against the Common Law attitude and a jurist has criticised it in that light :

> "(T)o restrict the description of possession to a description of the facts and the rights would be to distort the picture. Some of the facts may be more central than others, equally so may some of the rights. A mere catalogue of both will miss the pattern running through the whole picture." 41 (emphasis mine).

Be that as it may, this picture is far closer to Indian concepts than any other. Slowly, both the law and contemporary juristic

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39. D.R.Harris: The concept of possession in English law n in. A.G.Guest: Oxford Essays in Jurisprudence (1961 O.U.P.) Chapter 4; Tay: Concept of possession in the Common law (1964) 4 Melbourne Univ.L.Rev. 476 and reply by D.R.Harris: at 498.

40. Paton: Jurisprudence (1964 3d.) at 523 (taken from Ross: Law and Justice 171).

41. P.J.Fitzgerald: (Ed.) Salmond's Jurisprudence (1968,12d) 269. One might ask: central to what ?

thought have come to recognise the existence of property rights as limited rights which must constantly be shared with society and others. In actual fact, underlying the whole movement is the tacit assumption that a man's property is his and any intrusion on it will not be happily accepted. This is at complete variance with the Indian approach to the subject.

ii (a) The Indian concept of property and ownership.

The modern Indian lawyer, busy and perhaps happy with the western concepts of ownership, seems to have neglected the Indian concept of property, on which little analytical work has recently been done.[42] Nevertheless, a distinct Indian approach does in fact exist and it operates on premises different from those of western concepts of property. The Indian concept of property does not deal with "ownership" as an absolute independent category but as a concept defining a variety of proprietary interests, including partial rights. An English jurist has remarked :

> "(I)ndian jurists did not attribute to property a definite incidental content. There might be several owners of a thing, owning not merely shares, but extensive rights of different characters ... (They seem to ask:) what point is there in defining the owner of some rights over a thing as Owner and the owner of other rights as something other than owner: particularly when the word for 'owner' implies nothing more than 'belonging', 'mastery' and the like ? It is relevant to note here that the fluid, syncretic, non disjunctive approach to ideas and phenomena is notoriously characteristic of Indian thought, gradually merging and broad identities being far more congenial even to their category minded attitudes than staccato separation of things which share a characteristic." 43

Several examples of this may be given. Coparcenary property is jointly owned by members of a family, yet certain independent legal

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42. For a brief resume of the work done on the subject see Derrett: The development of property in India (800 - 1800 C.A.D.) (1962) 64 Z.V.R.15 at 15 - 20-1 (hereafter cited as Derrett: D.C.P.I. (1962))

43. Derrett: D.C.P.I. (1962) 15 at 20-1.

incidents regulate the alienation enjoyment and cessation of these interests which vary even amongst the members of the family. This might appear all the more strange when we consider Mr. P. Sen's[44] view that the son is owner not just of his father's ancestral property but also of his self acquired property, although he cannot restrain an alienation of the latter. He relies on the Mitākṣharā text :

> "Property in the paternal as well as grand paternal (ancestral estate) arises by birth alone ." 45

Again, despite numerous controversies about her capacity to do so,[46] a woman owns a limited interest in certain property owned by her.[47]

Indian jurisprudence contains a long controversy on the competing interests of God, priests and idols in Debutter property.[48] All these are discussed in detail later.

This has created an Indian view of ownership, whereby an owner of property has to admit, if sometimes grudgingly, the claims of others. This is an important characteristic of normal, day to day living. Professor Derrett, who has studied both the ancient approach and modern pressures on the concept of ownership, has rightly remarked :

> "The modern Indian situation, where the wage owner earns less for himself than others, and where the husband and wife

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44. P.Sen: Hindu Jurisprudence (1918) 130-133. For an up to date account see G.D.Sontheimar: The concept of Daya: A comparitive study (unpublished dissertation for Post Graduate Diploma SOAS London (1962) Thesis No. 153, Institute of Advanced Legal Studies) pp 131-3, 178-81.

45. Mitākṣharā I.29 (translated for me by Prof. J.D.M.Derrett).

46. Derrett: D.C.P.I. (1962) 30-1, 98-9.

47. Derrett: D.C.P.I. (1962) 28-29.

48. For a recent account of the subtle controversies see G.D.Sontheimer: The juristic personality of Hindu deities (1965) 67 Z.V.R. 45. For the latest case Jogendranath v I.T.Commr. A.I.R. 1969 S.C. 1089 and the comment of Derrett: (1969) 71 Bom.L.R. Jnl. 38-45.

(not less the latter than the former) live virtually for others than themselves can directly be traced back to these ancient propositions, or rather to the psychology which gave voice in and through them." 49

Indian Courts seem to have accepted this view of ownership in matters of personal law (as we shall see later). But it also seems to have been accepted in certain areas of "public" law. Thus in Gift Tax Commr. v P.Rangaswami Naidu[50] the Madras High Court ruled that if a father merges his self-acquired property into the family hotch-potch, it will not be subject to gift tax. The Courts assumed the existence of a corporate need, if not (as P. Sen might have argued) a corporate ownership.

This approach is also discernable in Mohammedan law. To begin with, there is the restriction on a testator who is prevented from willing away more than a third of his property.[51] Again, a person can create a private waqf whereby his legatees enjoy the usufruct, but an ultimate dedication is made to God. The Privy Council, part of the Western tradition, considered this illusory.[52]

More recently, the Supreme Court of India, while considering the Islamic law of gifts, outlined the areas in which a gift could be made without a transfer of possession.[53]

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49. Derrett: The concept of property in Ancient Indian theory and Practice (1968) Faculty of Law, Groningen, p.15.

50. A.I.R. 1970 Mad. 441.

51. See Hedaya (Grady Edn. 1870) S.671; Baillie: Mohomeddan law of Inheritance (1874, 2d.) 625.

52. See Abdul Fatah v Rusumoy (1894) 22 I.A. 76; 22 Cal. 619 at 631. See Derrett R.L.S.I. (1968) 439.

53. Valia Predikandi v Pathakkalam A.I.R. 1964 S.C. 275; unhappily 2 judges of the Allahabad High Court in Noor Jehan v Muftikar A.I.R. 1970 All. 170 (see particularly prs. 40-45 pp.178-9) caught up in Western ideas of the transfer of property, declared such a gift to a daughter-in-law invalid. The Supreme Court case is discussed in detail by M.Aghahosseini in A Comparitive Study of the Islamic and English law of gifts (unpublished dissertation for Post Graduate Diploma in Law SOAS 1971). I am grateful to Mr. Aghahosseini for having discussed this case with me.

Another area where the multitrial rights operating on the same property are recognised in one plot of land can be found in the Mohammedan law of pre-emption which has now become a part of the law of India.[54]

Thus it appears that the day to day lives of the Indian people are governed by property concepts which are different from the Common Law concepts. This also seems true of traditional attitudes to the King's ownership of land.

b. The State's ownership of land.

The ancient law on this is not definitive. A text of Manu[55] gives the King a share in treasure troves and the produce of the earth. A text of Katyayana[56] gives the King one sixth of the produce because he is the lord of the soil. Bhattaswamin's Pratipadapancika on Arthasastra (II, 24) quotes a verse to show that the King is held to be lord of the land, moveables (distinct from those that belong to masters of families) as their Svāmyam (owner); lands, tanks, water pools are all subject to revenue assessment on this ground.[57]

All these have excited a lot of study, which has in part been directed to support peasant proprietorship during British rule and even

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54. This was established in Mahmood J.'s judgement in Gobind Dayal v Inayatullah (1885) 7 All.775 at 779. This has been discussed in an unpublished paper by M.H.Siddiqui: The traditional law of preemption and its practice in contemporary India (1970, SOAS, London). I am grateful to the author for lending me a copy of the paper and for permission to refer to it. See also T.Mahmood: Supreme Court's decision on preemption - a plea for reconciliation in Muslim Law (1965) 1 S.C.J. Jnl. 94-6.

55. Manu: VIII, 39. Note also Kane III H.D. 867 where other verses in Manu, which controvert this, are given.

56. Katyayana (Kane's Collection) 16-7.

57. See (1925-6) XII Jnl. of Bihar and Orissa Research Society 138; see also Brihaspati: XXV, 67-8 on the King's right of escheat.

after.[58] Others have argued that there was joint ownership of land[59] while others still admit that the King was landlord and the peasant proprietor had a perpetual lease contingent on the performance of an obligation.[60] The controversy is, in a sense, academic because we have to look not at the texts but the actual land system for an answer.

We know that a large number of grants were in fact made to Brahmins and others.[61] A student of the land system of Gupta times has remarked :

> "The King's right over land is substantiated by a host of Gupta inscriptions which accord the donations of plots of lands as well as entire villages, often with total exemption from taxes, which otherwise went to the King's coffers." 62

But it has been suggested that the King's rights represented more a political power resting on symbolic ownership.[63] In essence, it appears that the King (when he had the political power) was acknowledged in theory and practice as overlord of the soil, with a capacity to make grants and exempt land from taxation. This system was in fact continued by the Mughal and British administration.

A foreign observer sums up the position for our purposes very adequately :

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58. e.g. K.P.Jayaswal: Hindu Polity (Ed 1955) pp.343, 348, 350; L.Gopal: Ownership of agricultural land in Ancient India (1961) 4 J.E.S.H.O. 151

59. Sir Henry Maine: Village Communities in East and West (1890) 91-4; but see contra D.N.Jha: Revenue system in Post Mauryan and Gupta times (1967 Calcutta) Chapter II Land Ownership and the King's Right to Tax pp. 9-21.

60. M.H.Gopal: Mauryan Public Finance (1935) 62.

61. See R.C.Sharma: Indian Feudalism : c. 300-1200 (1965 Calcutta) Chapter I pp.1-76 esp. 71 and 77; R.C.Sharma: Land grants to vassals and officials in Northern India (1961) IV J.E.S.H.O. 70 - 105; D.C.Sircar: Landlordism and Tenancy in Ancient and medieval records as revealed by epigraphical records (1969 A.P.H.).

62. D.N.Jha: (supra f.n.59) generally.

63. See D.C.Sirca (Ed.) Land system and feudalism in Ancient India (1966) pp.23-32 at 29-30.

> "The King's ultimate ownership of the soil would still not be open to debate if some Indian historians misled by publicists early in this century had not assumed that ownership in India was like ownership in England and that there was something unsatisfactory about concurrent though distinct rights of ownership in land between the ruler and the ruled. In medieval times the monarch seemed incredibly forbearing if he paid for a plot of land he required for his own purposes. In order to satisfy the subjects a King observed certain conventions - yet the former were always complaining that in practice the King's agents interpreted them too far in their master's favour. But his inherent superiority in the allocation of 'enjoyments' was a source of pride and not resentment. It was only when foreigners were found utilising the very large benefits of the situation to their own advantage that Indians awoke to the undoubted peculiarity of their rajas' position and, if they were educated in Western ideas, rejected it." 64

All this directly conflicts with the lawyer and judges' dream of "eminent domain". Certainly a check must be put on the State's power to acquire property and the Constitution contains generous provisions in this regard.

Two distinct patterns of interpretation exist. On the one hand there is the Western theory that property rights are of an exclusive nature and are to be jealously guarded. This is accompanied by rules of statutory interpretation and the theory of eminent domain which require that interference with property rights be fully compensated. On the other hand, there is the Indian approach which works on the assumption that the rights of an owner have to adjust (and sometimes accede) to the competing claims of others and gives to the state extensive powers to interfere with the citizen's ownership of land. The Western theory has been embodied by the Courts which have defined property more in the spirit of reform than on the basis on Indian needs, construed strictly the State's power to effect agrarian reform and upheld (despite the pressure of Constitutional Amendment) the Western theory of Eminent Domain.

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64. Derrett: Bhu Bharana, Bhu Palana, Bhu Bhojana (1959) B.S.O.A.S. 108 at 115. One should not overlook the fact that in British days land revenue was equated with rent.

3. The definition of property - The spirit of reform

Apart from using the Blackstone formula[1] that property must be capable of being "acquired, held and disposed", neither the Constitution nor statute law[2] define property. If the Supreme Court had followed the Blackstone formula closely, as they appear to have done in a few cases,[3] they would have extended the protection of the Constitution to only such rights which constitute full ownership in the Western sense,[4] and missed out a large number of typically Indian rights which have always been treated by the traditional law as property rights.[5]

The Indian Supreme Court began by stating clearly in Commr. v L. T. Swamiar[6] that they would protect

> "those well defined types of interests which have the insignia and characteristics of property rights."

Property was thus taken to include a large number of interests including the right of a shareholder to manage his company,[7] a right to evict and

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1. See Blackstone I Commentaries (1775) 138; see also R.Pound: The law of property in recent juristic thought (1939) 25 Am.B.A.Jnl. 993 at 997, showing the Roman origins of the formula and citing the six elements which are usually associated with property rights. These elements are: jus possidendi, jus prohibendi, jus dispondendi, jus utendi, jus fruendi, jus abutendi.

2. See Article 19(1)(F) of the Constitution. The words "immoveable" and "moveable property" are defined in S.3(26) and 3(36) of the General Clauses Act 1897 read with S.3 of the Transfer of Property Act 1882. But to follow those definitions for interpreting the Constitution would be to limit the definition of property to "tangible" goods.

3. See Amar Singh v Custodian Evacuee Property A.I.R. 1957 S.C. 599 at pr.23 p.611; Azeez Basha v Union A.I.R. 1968 S.C. 662 at pr.35 p.675.

4. i.e. the right to "acquire, hold and dispose" property.

5. e.g. the right to manage religious institutions or the right of pre-emption on grounds of vicinage.

6. A.I.R. 1954 S.C. 282 at pr.12 p.288-9.

7. Dwarkadass v Shoalapury Spg. and Wvg. Co. Ltd. A.I.R. 1954 S.C. 119 read with Chiranjit Lal v Union A.I.R. 1951 S.C. 41.

annul under-tenures,[8] a mahant's right to manage a religious establishment,[9] an interest in a commercial undertaking,[10] unpaid wages,[11] the salary of a Government servant,[12] a mining lease,[13] a right to prior purchase,[14] a money grant,[15] property seized under the Income Tax Act,[16] the ownership of land under a tenancy,[17] the right to manage certain literary institutions,[18] a privy purse,[19] and gold.[20] There have also been a large number of exceptions both in the Supreme Court and the High Court.[21]

The question is : What are the criteria used by the Court ?

Western concepts of property have certainly played an important role. Thus in Amar Singh v Custodian, Evacuee Property[22] the Supreme Court held that the right of quasi-permanent allottee of evacuee property

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8. W.B. v Subodh Gopal A.I.R. 1954 S.C. 92.

9. Commr. H.R.E. v L.T.Swamiar A.I.R. 1954 S.C. 282.

10. Saghir Ahmad v U.P. A.I.R. 1954 S.C. 728.

11. Bombay Mfg. & Dyg. Co. v Bombay A.I.R. 1958 S.C. 328.

12. Khem Chand v Union A.I.R. 1963 S.C. 687

13. Gujerat Pottery Works v B.P.Sood A.I.R. 1967 S.C. 964.

14. Prem Dulari v Raj Kumari A.I.R. 1967 S.C. 1578.

15. M.P. v Ranojirao Shinde A.I.R. 1968 S.C. 1053.

16. I.T.O. v Sethi Brothers A.I.R. 1970 S.C. 292.

17. Kalanki Devi v M.R.T. Nagpur A.I.R. 1970 S.C. 439.

18. Damayanti v Union A.I.R. 1971 S.C. 966 (also discussed in Overseas Hindustan Times March 6, 1971 p.4); see also Kerala v Mother Provincial A.I.R. 1970 S.C.2079

19. Madhav Rao Scindhia v Union A.I.R. 1971 S.C. 530.

20; Badri Prshad v Collector A.I.R. 1971 S.C. 1170.

21. Some of these are discussed below.

22. A.I.R. 1957 S.C. 599.

was not protected by the Constitution because

> "the sum total ... (of his rights) d(o) not in any sense constitute qualified ownership of the land allotted (and are at best) analogous to what is called jus in re aliena ... in Roman law." 23

Again in a series of cases[24] the Supreme Court used English law distinctions to show that a right under an executory contract[25] relating to moveable property,[26] a bare licence[27] and rights under an unregistered contract[28] were not property, whereas a profit a prendre,[29] a lease or rights which are more than a bare licence[30] were property. But this reference to Western law merely camouflages the fact that the Court in the first instance wanted to leave the administration enough lee-way to cancel the allottee's rights,[31] which would not have been possible if

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23. Ibid at pr. 23 p.611.

24. Firm Chotabhai C.J.Patel v M.P. A.I.R. 1953 S.C. 108; Ananda Behera v Orissa A.I.R. 1956 S.C. 17; Shanta Bhai v Bombay A.I.R. 1958 S.C. 532; Mahadeo v Bombay A.I.R. 1959 S.C. 735; A.K.Mehboob v M.P. A.I.R. 1966 S.C. 1637.

25. See A.K.Mehboob & Sons v M.P. A.I.R. 1966 S.C. 1637 at pr.15 p.1643 col.2.

26. See Anand Behera v Orissa A.I.R. 1956 S.C. 17 which relies on the terms of the Transfer of Property Act 1882 and stresses that if the contract had been registered it would have been a profit a prendre and therefore property.

27. Firm Chotabhai C.J.Patel & Co. v M.P. A.I.R. 1953 S.C. 108 at pr.21 p.111. Note that this case is still good law and Mahadeo v Bombay A.I.R. 1959 S.C. 735 which purports to overrule it (at pr.28 p.742) merely decided that the rights in this case were more than bare licences.

28. Shantabhai v Bombay A.I.R. 1958 S.C. 532 at pr.5 p.533 (because it was not a profit a prendre); Mahadeo v Bombay A.I.R. 1959 S.C. 735 at pr.7 p.738 (because it did not run with the lane).

29. See Bose J. in Anand Behera v Orissa A.I.R. 1956 S.C. 17 at pr.10 p.19; and his dissent in Shantabhai v Bombay A.I.R. 1958 S.C. 532 at pr.23 p.535 where he cites 12 Halsbury (Simonds Edn.) 522.

30. Hidayatullah J's judgement in Mahadeo v Bombay A.I.R. 1959 S.C. 735 at pr.18 p.740.

31. See A.I.R. 1957 S.C. 599 at pr.4 p.601-2; pr.7 p.603; pr.20 p.607-8; pr.21 p.609-10 (where the impermanent nature of the interest is stressed) at pr.23 p.611 the Court refers to the possibility of "cancellation according to the exigencies of the administration of evacuee law."

the rights had become entrenched as protected constitutional rights. Similarly, in the second set of cases, the Court applied all these distinctions to ensure that licencees from landlords would not receive Constitutional protection, after Constitutional Amendment had taken away the rights of their erstwhile licensors. This is borne out by the fact that all these cases involved Zamindari rights. Further, the Court left the meaning of a bare licence undefined[32] so as to take away Constitutional protection from as many such licensees as possible.

In actual fact the Court's guiding principle appears to be that it will protect such rights as it thinks are worthy of protection. This is true even as regards rights other than the right to property. Thus in R.M.D.C.Chamarbaghwallah v Bombay[33] the Court held that gambling was not a profession which merited protection. Again, in Coverjee v Excise Commr.[34] they refused to protect the right to sell liquor, though that case has now been superseded by a recent case.[35] In taking

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32. See Hidayatullah J.'s attempt to distinguish Chotabhai's case (1953) in Mahadeo v Bombay A.I.R. 1959 S.C. 735. His reasons for stressing that the contract was an agreement, and agreements were more than mere licences, may describe their Indian nature but are not convincing as a test (see pr.18 p.740).

33. A.I.R. 1957 S.C. 699.

34. A.I.R. 1954 S.C. 220 quoting at pr.7 p.223 from Field J. (who emphasises the Western religious aspect) in Crowley v Christenden (1890) 34 L.Ed. 620. See also Assam v Stristikar A.I.R. 1957 S.C. 414.

35. Subba Rao J.'s judgement in K.Krishnan v J.K. A.I.R. 1967 S.C. 1368 at pr.11 p.1371-2. The learned judge took the view that liquor was a trade but it could be abolished altogether under the terms of Art.19(6) which allows reasonable restrictions. This attitude accords with the traditional idea that a "thing" may be legal but reprobated. See Derrett: The criteria for distinguishing between legal and religious commands in the Dharmashastra A.I.R. 1953 Jnl. 52-53, 57-62, Derrett R.L.S.I. (1968) 75-96. See also the more recent High Court cases: P.Ramchandra v State A.I.R. 1971 Ker.46 (F.B.) which cites Subba Rao J.'s judgement at pr.18 p.150; Purxotama v Union A.I.R. 1970 Goa 35 at 45-6.

this view, the Court has strictly followed the Common Law, which declared wagering contracts void[36] but protects the right to sell liquor as not opposed to public policy.[37] But the Court appears also to have relied on Indian sources[38] to come to the conclusion it did. Again in Hamdard Dawakhana v Union[39] the Court, relying on traditional attitudes to sex and obscenity,[40] refused to accept that the right to speech included advertising the cure of certain sexual disorders.

In defining the right to property too, the Court has assumed a stance of moral and social reform rather than pretended to define property in precise Western terms. A clear example of this is their decision in Bhau Ram v Baij Nath[41] where the Court decided that the right to preemption on grounds of vicinage, which had been accepted as a property right since 1885,[42] was not worthy of protection because it produced an atmosphere of communalism and prevented strangers from

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36. See Cheshire and Fifoot: The Law of Contract (7d).pp.271-287 S.30 Indian Contract Act 1872.

37. See 22 Halsbury (3d) 514 citing R v Fowler (1669) 2 Keb. 506 (a short note of this can be found at 84 E.R. 318); The resolution of the judges (1624) Hutt. 99.

38. See Das J.'s judgement in the gambling case A.I.R. 1957 S.C. 699 at pr.38 p.719 where he cites the Rigveda, Mahabharata, Manu, Yājñavalkya, Kautilya, Brihaspati and the Hedaya. See on gambling Kane III H.D. 538-42.

39. A.I.R. 1960 S.C. 554.

40. See infra Chapter VII. See for example the judgement in Ranjit Udeshi v Maharashtra A.I.R. 1965 S.C. 881 which declared D.H.Lawrence's Lady Chatterley's Lover obscene. This, as we will see in Chapter VII, p548 ff contrasts with the position in other countries.

41. A.I.R. 1962 S.C. 1476.

42. See Mahmood J.'s judgement in Gobind Dayal v Inayatullah (1885) 7 All. 775 (F.B.) which was approved by the Supreme Court in the 1954 case of Audh Behari v Gajadhar A.I.R. 1954 S.C. 417 at 421. But it should be noted that preemption has been accepted as a custom only in the North of India because in Krishna Menon v Keshavan (1899) 20 Mad. 305 it was declared as contrary to Justice, Equity and Good Conscience.

moving into a locality.[43] This decision has been generally followed[44] except in cases where the right to preemption is that of a co-owner[45] or someone in the family.[46] Imbued with the spirit of social reform the Court appears to have stressed the social objectives of the Indian Constitution[47] rather than cater to Indian needs. This is made clear by Sarkar J.'s dissenting judgement, where he emphasised that the desire for privacy[48] and the need to live in compact communities[49] was an essential ingredient of Indian life, which should be protected from the spirit of reformism.[50]

But the desire to put on a reforming garb is even more clear in the Supreme Court's attitude to whether the right to manage religious institutions is a property right. In 1954 the Court took the view that

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43. A.I.R. 1962 S.C. 1476 at pr.8 p.1481 (per Wanchoo J.). Reference was made earlier to Article 15 of the Constitution, which prohibits discrimination on grounds of caste, colour, race or sex.

44. See Ram Sarup v Munshi A.I.R. 1963 S.C. 553; Sant Ram v Labh Singh A.I.R. 1965 S.C. 314 (where it held that Bhau Ram's case (supra) applied to customary law as well as statute law. This had the effect of almost abolishing altogether the traditional law of preemption). Some rights of pre-emption are however protected (infra f.n. 45)

45. See Mahboob Hasan v Ram Bharosey A.I.R. 1966 All. 271 (where it was held that preemption by Shafi-i-sharik (co-owner) was valid, but that by Shafi-i-khilat (adjoining owner) was not).

46. See Ayyangar J. in Ram Sarup v Munshi A.I.R. 1963 S.C. 553 at pr.21 p.560.

47. Wanchoo J. in Bhau Ram v Baij Nath A.I.R.1962 S.C. 1476 (supra); Hidayatullah J. in Sant Ram v Labh Singh A.I.R. 1965 S.C. 315 at Col. 2.

48. Sarkar J. (in a dissenting judgement on behalf of himself and Das Gupta J.) in Bhau Ram v Baij Nath A.I.R. 1962 S.C. 1476 at pr.35 p.1489.

49. Ibid at pr. 33 p.1488; pr.37 p.1489.

50. See T.Mahmood: Supreme Court's decision on preemption - a plea for reconciliation in Muslim law (1965) I S.C.J. Jnl. 94-6 at 96 supporting the judgement on the basis of Shafei School of Muslim law.

the right of management of a mahant [51] or a shebait[52] was property. Soon however the Government became a little concerned at the tremendous power that the owners of such offices were able to wield and in 1962 published the Report on Religious Endowments[53] in which a plea was made that the powers of religious managers be curbed.[54] The Court did not reverse its earlier rulings,[55] but took the view that it would not extend its policy of treating similar rights as property rights. This is quite apparent in two decisions that it made just after the publication of the Report, in which it held that the rights of tilkayat[56] or adya-sevak[57] are not property. More recently in Kamajan v Commr. H. R. E. (1971)[58] the Court has actually quoted from the Report on

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51. See Commr. v L.T.Swamiar A.I.R. 1954 S.C. 282; Sri Jaganath v Orissa A.I.R. 1954 S.C. 400.

52. See the decision of Angurbal v Debrata A.I.R. 1951 S.C. 293, which though on a personal law point was quoted with approval in Commr. H.R.E. v L.T.Swamiar A.I.R. 1954 S.C. 282.

53. This is popularly known as the C.P.Ramaswami Iyer Report (1960-2) discussed Derrett in (D.E.Smith ed.) South East Asian Politics and Religion (1966 Princeton) Chapter 14; C.M.H.L. (1970) Chapter 10; R.L.S.I. (1968) Chapter 14; I.M.H.L. (1963) Chapter 9.

54. Ibid Report Chapter 16; Recommendations 2-7 esp.10, 26, 71 (commenting on Dargah Committee v Syed Hussain A.I.R. 1961 S.C. 1402) 79.

55. Thus the position on the mahant's rights is maintained in Digyadarsan v Madras A.I.R. 1970 S.C. 181; S.T.Swamiar v Commr. H.R.E. A.I.R. 1963 S.C. 966.

56. Tilkayat v Rajasthan A.I.R. 1963 S.C. 1638.

57. Bira Kishore Deb v Orissa A.I.R. 1964 S.C. 1607.

58. A.I.R. 1971 S.C. 853

Religious Endowments[59] and held that the right of a hereditary trustee is not property, even though the difference between a shebait and a hereditary trustee is not great.[60] This decision, which may be per incuriam because it ignores a decision reported in 1963,[61] does demonstrate the desire of the Court not to be seen to be protecting traditional entrenched interests.

This ties in with the fact that the 1954 judgements were written by Mukerjea J. who was himself a scholar of the law of religious endowments[62] while the reforming trend was begun by Gajendragadkar J. who has otherwise been associated with a reforming trend in the Court.[63]

The Court is caught between the need to protect the vast number of traditional interests which are clearly in most cases not "property" in the strict Western sense of the word, and a desire to ensure that they are not accused of protecting entrenched interests not worthy of protection. Instead of openly stating their objection to the particular claim canvassed before them, they have ostensibly applied Western legal terminology in an effort to dispel any fears of reformism. Professor Derrett describes this process in another context :

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59. Ibid at pr. 14 p.897

60. See R. Choudhry v R. Mohaprabhu A.I.R. 1971 Or. 274 at pr.7 p.275.

61. See Anant Prshad v A.P. A.I.R. 1963 S.C. 891; but in Kamajan v Commr. H.R.E. A.I.R. 1971 S.C. 891 (at pr.12 p.897) the more recent case of Sanandada Murthi v Madras (1970) II S.C.R. 424 is distinguished.

62. He delivered the Tagore Law Lectures on The Hindu Law of Religious and Charitable Endowments (1952) and wrote the judgements in Commr.H.R.E. v L.T.Swamiar A.I.R. 1954 S.C. 282; Sri Jagannath v Orissa A.I.R. 1954 S.C. 400.

63. Gajendragadkar J. wrote the judgements in Tilkayat v Rajasthan A.I.R. 1963 S.C. 1638; Bira Kishore Deb v Orissa A.I.R. 1964 S.C. 1601. On his reforming attitude see Galanter: Hinduism, Secularism and the Indian Judiciary (1971) 21 Philosophy East and West 464-487. See also his own book on Secularism (1971 Bombay).

> "A modern state influenced markedly by European and American precedents hopes to protect beliefs of a private character, whilst restraining overt acts, whether acts in the nature of 'doing' or 'not tolerating', which are conceived to be against the public interest. For example, the religious belief in the merit of giving daughters in marriage to an idol with the expectation that they shall become prostitutes is not tampered with, but dedication of girls in such circumstances is prohibited, and subject to penalty. The belief that animals should be sacrificed to certain deities is not condemned but the sacrifice is prohibited ... " 64

In as much as the Court has sought to protect a large number of interests other than those which constitute ownership in the Western sense, they have followed tradition. But in as much as they also assumed the garb of reformism, they have taken an urban attitude to typically Indian situations, without enquiring into the social need that moulded those situations in the first place and without doubting the sufficiency of their purely legal techniques to be able to grapple with such problems.

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64. Derrett: Freedom of religion under the Indian Constitution (1963) 12 I.C.L.Q. 693 at 693-4.

4. The Supreme Court and Agrarian Reform.[1]

The first major controversy between the Courts and Parliament was in the area of agrarian reform. It began in the Constituent Assembly in 1947 and culminated in the case of Golak Nath v State of Punjab[2] where the Court decided that all the Amendments of Part III of the Constitution (including those affecting agrarian reform) were invalid and beyond the competence of Parliament.

i. The Constituent Assembly.[3]

The first clash between the landlords and their assailants began on the 2nd May, 1947, when Rao Jaganath Baksh Singh (of U.P.) moved an amendment that the word "just" precede the word "compensation"

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1. See generally M.L.Upadhyaya: Land legislation and the Indian Constitution (1969) I Law Review (SOAS) 63-9; Merrillat (1970) Chapters I, II, V, VI, VIII; D.Narasu: Agrarian reforms (in G.S.Sharma(Ed.) Property Relations in Independent India, 1968) 131-146; B.Singh (Ibid) 147-156; A.Kunnuswami: (Ibid) 157-165; H.M.Jain (1968) Chapter 10. For an analysis of the reform in particular areas see: Moore and Freydig: Land tenure legislation in Uttar Pradesh (1955; U.C.L.A. Modern India Project Monograph No. 1); M.L.Upadhyay: Legal aspects of agricultural holdings in Madhya Pradesh (1967; Post Graduate Diploma Thesis, University of London, 295, Chapter VI pp.165-207. G.I.A.L.S.D

2. A.I.R. 1967 S.C. 1643.

3. The Constituent Assembly debated the Article on three occasions. The first on May 2, 1947 (see III C.A.D. 505-18) on whether the word "just" should precede the word "compensation" in the Article 19 (now 31) as it then stood. On Nov.17,1948 the Article again came up for discussion but T.T.Krishnamachari proposed that discussion be adjourned (see V C.A.D. 372). The third discussion was the main discussion and is recorded in IX C.A.D. 1194ff . The best account of this and of the discussion that took place in the background is contained in G.Austin: The Indian Constitution (1966) 87-99; Merrillat: Land and the Constitution (1970) 52-78; H.M.Jain: Right to Property (1968) 24-56; P.H.Ghosh: The Constitution of India : How it was framed (1966) 94-106 (he discusses the later amendments as well); Merrillat: Compensation for taking property : A historical footnote to Bela Banerjee's case (1959) I J.I.L.I. 375 ff.; Jagat Narain: The Indian Supreme Court on Property Rights and the Economic Objectives of the Constitution (1968) III The Journal of Law and Economics Development 147-180 at pp.147-149.

in the Article guaranteeing property rights.[4] While Dr. S. C. Banerjee[5] thought that the Article as it stood was compatible with socialism, A. P. Jain wanted the clause deleted because he feared the clause

> "would protect the microscopic minority of propertied classes and deny the rights of social justice to the masses." 6

S. Nagappa from Madras thought that compensation must be just but thought

> "(w)e need pay only what is reasonably required to enable him to maintain himself and his family (for) one or two generations." 7

The idea was supported by V. D. Tripathi (a member of the U.P. Land Reform Committee) who warned that payment of compensation would eventually fall on the peasant, who would not be freed from his shackles for at least another 25 years.[8] The Rajas replied that their plea for compensation covered the interests of the peasants as well[9] and L. Sinha, describing the plight of the Orissa landlords, thought that they should be paid off as soon as possible.[10] R. K. Sidhwa summed up the mood :

> "It is very deplorable that at the present moment when various legislatures are out to abolish the jagirdari and

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4. III C.A.D. 505.

5. III C.A.D. 508.

6. III C.A.D. 508-9 at 509. The whole speech is interesting and stresses that the landlords have no title in the first place.

7. III C.A.D. 506-8.

8. III C.A.D. 510-13. He expressed the fear that the clause "may be so interpreted that any progress may be retarded and the Congress and public organisations may not freely advance in the direction that they intend to." See also a similar sentiment by V.C.Keshava Rao ibid at 513.

9. Raja Bahadur Shyamnandan Sinha: III C.A.D. 514-6.

10. III C.A.D. 517

> and zamindari systems by payment of small compensation or no compensation at all, under this clause we are asked to pay compensation for any property that is going to be acquired." 11

He warned that

> "(a)ny owner of the property will go to the Supreme Court and get his demand fulfilled under the clause." 12

The situation was compromised by V. Patel's assurance that the discussion was premature.[13]

After this the debate moved away from the Assembly and negotiations took place behind the scenes in order to negotiate a compromise but without adversely affecting land reform which had already begun in three States. As a result of these negotiations[14] a formula was arrived at by which it was agreed that compensation, or the principles on which it must be paid, must be laid down in the enactment. But certain clauses saved legislation on agrarian reform that was pending in the States.[15] The landlords in the Constituent Assembly were aware that these clauses had taken away from them any protection that they could have hoped for in the States of U.P., Bihar and Madras where legislation was pending.[16]

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11. III C.A.D. 509

12. Ibid.

13. III C.A.D. 518.

14. The best account of this is given in Austin (supra f.n.3) 90-97; Merrillat (1970) (supra f.n.3) 56-59

15. These were Article 31(4) and (6) in the original Article.

16. See N.Ahmad: IX C.A.D. 1198; Raja Jaganath Baksh Sing: ibid at 1287; Maharaja Darbhanga: ibid at 1270. Note Pandit Pan's observations on the U.P.Bill that he was responsible for sponsoring at ibid p.1288-9; and on the Bihar Bill see ibid at 1241; there was even a suggestion that the protection in the Articles that all such Bills should be presented to the President for approval be done away with. See ibid 1213 (per H.V.Kanath) and 1292 (per Bishwanath Das). For a discussion of the effects of the Constitutional provisions see Land Reform and the Law Eastern Economist (March 18,1952) 728.

It was under these protected statutes that cases came before the Court to trigger off the first controversy between the judiciary and the legislature on the meaning of the property provisions of the Constitution.

The onus of deciding on the vires of the Bihar and U.P. Acts fell on the Patna and Allahabad High Courts respectively. The latter declared that the U.P. Zamindari Abolition and Land Reform Act 1951 was valid[17] while the former decided that the Bihar Land Reform Act 1950 though intra vires Article 31(2) of the Constitution because of the protection afforded by Article 31(4) and (6) was ultra vires Article 14 (the equality provisions) because it provided a graduated scale of compensation related to the size of the landholdings, which seemed to the Court to be clearly discriminatory.[18]

Parliament (which in fact consisted of the Constituent Assembly acting as Parliament pending the general election) amended the Constitution by adding Articles 31A and B to the Constitution, the latter read with Schedule IX containing a list of Statues which were excluded from judicial review on the basis of Articles 14, 19 and 31, and the former containing similar provisions with respect to other aspects of agrarian reform.

This was followed by appeals to the Supreme Court from U.P., Bihar and M.P.

In the last 21 years the Supreme Court has considered a large number of cases on agrarian reform. In the first nine years it tried

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17. Surya Pal Singh v U.P. A.I.R. 1951 Allahabad 674. For a good account of this case and the arguments of counsel see F.J.Moore and C.A.Freydig: Land Tenure Legislation in Uttar Pradesh (1955 Berkeley, California: Modern India Project Monograph No. 1) 41-49.

18. Kameshwar Singh v Bihar A.I.R. 1951 Patna 91.

to use foreign principles to review Statutes which Constitutional Amendment has specifically excluded from their jurisdiction. They failed to evolve a consistent pattern of review on this basis. From 1960 they evolved, without reference to foreign case law, a consistent test about agrarian reform which is now established. In 1962 the Court gave a technical and restrictive meaning to the words of the Amendment in an attempt to bring cases connected with agrarian reform under its review. To these problems we now turn.

ii. The first ten cases and the first ten years.

In the course of the first ten years of its existence the Supreme Court adjudicated on 11 important cases on agrarian reform. The Table below gives the name of the cases and indicates which judges participated and read judgements in those cases.

Table II showing the 11 important cases on agrarian reform between 1950 and 1958 and the voting patterns in those cases.

	1	2	3	4	5	6	7	8	9	10	11	12
Shastri	+1	vl	vl	v								4
Mahajan	*1	*1	*1		*	v	v	v				7
Mukherjea	*2	vl	vl	*	v	*	*	v	v			9
S.R.Das	+2	*2	*2	v		v	v		v	v	*	9
Aiyar	*3	vl	v									3
Bose						v	v	v		v		4
Hasan				v	v	v	v				v	5
Bhagwati				v	v				v			3
Jaganadhdas					v			*		v		3
Ayyar								v	*	v	v	4
Sinha											v	1
Imam									v	*	v	3

Key:

v = participation + = dissent * = majority judgement

*1 +1 etc etc. with judgement vl etc agreeing with *1 etc.

1 = Kameshwar v Bihar A.I.R. 1952 S.C. 252

2 = Visheshwar v U.P. (1952) S.C.R. 1020

3 = Surya Pal Singh v U.P. (1952) S.C.R. 1026

4 = Gajapati v Orissa A.I.R. 1953 S.C. 375

5 = Raghubir v Court of Wards A.I.R. 1953 S.C. 373

6. = Zamindar of Eltayapuram v Madras A.I.R. 1954 S.C. 257

7 = Verrappa Chettiar v Madras A.I.R. 1954 S.C. 605

8 = Dhirabha Devi Singh v Bombay A.I.R. 1955 S.C. 47

9 = Amar Singh v Rajasthan A.I.R. 1955 S.C. 47

10 = Kamakshya v Assam A.I.R. 1956 S.C. 63

11 = Bhairebendra v Assam A.I.R. 1956 S.C. 604

12 = Total number of votes cast.

In only two of the eleven cases did the Court take a decision invalidating the statute before them.[19] In only one of the cases, Kameshwar v Bihar,[20] was there an extended discussion of the concepts and techniques used by the Court. In that case the whole Court agreed that the Bihar Land Reform Act 1950 was excluded from judicial review by the First Amendment Act 1951, but the majority found that S.4(b) and 23(f) of the Statute, by which the State acquired rents and other debts due to the landlords and gave them 50 per cent of the value of these debts as compensation, amounted to acquiring a chose of action and was therefore a colourable exercise of power, outside the competence of the legislature. In achieving this result the Court was influenced by certain other considerations. Firstly, they made clear their hostility to the Statute. Secondly, they made extended references to cosmopolitan jurisprudence (especially the doctrines of eminent domain and colourable legislation) and found the Statute wanting on that basis. The latter doctrine was to give the Court a power of review where they had none. Thirdly, they were considerably influenced by the facts of the individual cases before them. We will discuss these factors separately.

ii (a) Hostility to the Statute.

Mahajan J (who read the leading majority judgement[21]) makes his hostility to the statute apparent.

> "The title of the Act indicated that the law provides for some kind of land reform in Bihar. Its ... preamble gives no indication what that means ..." 22

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19. Kameshwar v Bihar A.I.R. 1952 S.C. 252; Raghubir v Court of Wards A.I.R. 1953 S.C. 373.

20. A.I.R. 1952 S.C. 252

21. Mukerjea J. accepts this at 279 col.1 and N.C.Aiyar J. at pr.113 p.293.

22. Ibid at pr.33 p.268.

> "There is no scheme of land reform within the framework of the statute except the pious hope that the Commission may produce one ..." 23

> "It may be conceded that the present statute does not disclose the legislative mind as to what it would ultimately like to do ..." 24

Mukerjea J. thought that the Act imposed onerous obligations on the landlord without his consent, and complained that

> " ... legislation of this character is a complete novelty, the like of which has seldom been witnessed before." 25

The attitude of the minority was quite the contrary. Shastri J. put it very well when he said :

> "The fact of the matter is that the zamindars lost the battle in the last round when this Court upheld the Amendment Act, which the provisional Parliament enacted with the object among others of putting an end to the litigation ... (I)t is no disparagement to counsel to say that what remained of the campaign has been fought with such weak arguments as overtaxed ingenuity could suggest." 26

Das J. (the other minority judge) made clear :

> "We must not read a measure implementing our twentieth century Constitution though spectacles tinted with early nineteenth century notions as to the sanctity or inviolability of individual rights." 27

The minority, unlike the majority, also rejected the argument that the Act delegated too much power to the executive, on the grounds that the delegation of such power was both necessary and inevitable.[28]

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23. Ibid at pr. 35 p.270.

24. Ibid at pr.52 p274 col.2. But note also his comments approving of agrarian reform in the light of the Directive Principles of State Policy at p.274 col.1.

25. Ibid at pr.84 p.280 col.2.

26. Ibid at pr.8 p.262-3. He is making a reference to his own judgement in Shankari Prashad v Union A.I.R. 1951 S.C. 458, where it was held that the First Amendment Act 1951 was valid and within the competence of the legislature. See also Das J.'s comments at p.291-2 (see arguments on Ground "C" from pr.108).

27. Ibid at pr.106 p.290 col.2.

28. See Mahajan J. at pr.58; Shastri J. at pr.21 p.266 col.2.; Das J. at pr.110 p.292-3.

It must however be noticed that despite their hostility to the statute the majority made it clear :

> "(H)owever repugnant the impugned law may be to our sense of justice ... it is for the appropriate legislature to see if it can revise some of the unjust provisions which are repugnant to all notions of justice and are of an illusory nature." 29

ii (b). The reference to cosmopolitan jurisprudence and techniques

The Court relied heavily on the Anglo-American doctrine of eminent domain. Thus Mahajan J. quotes jurists from Grotius to Cooley[30] and case law not always of this century[31] to conclude that choses of action cannot be acquired and that any attempt to do so is a colourable exercise of power. He thought :

> "All these principles are well settled." 32

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29. Mahajan J. at pr.49 p.273; see also pr.71 p.278; Mukherjea J. at pr.84 p.280 col.2 sub pr.3.

30. He refers to Broom: Constitutional law (no page reference) at pr.38 p.270; Thayer: I Cases on Constitutional law 953; Nichols: Eminent Domain 3; Grotius: De Jure Belli at Facis at pr.39 p.271; Oxford Dictionary Vol 8 p.1526 on the meaning of "provision" at pr.45 p.272; Willoughby: Constitutional law 795 at pr.45 p.273; Cooley: II Constitutional Limitations 113 at pr.54; Willis: Constitutional law 816; Nichols: Eminent domain 97 at pr.55 p.275.

31. At pr.55 p.275 reference is made to Cincinatti v Louisville etc. Rly. Co. (1912) 223 U.S. 390 as authority for the proposition that choses of action cannot be acquired; at pr.57 p.276 the following cases are cited on the doctrine of colourable legislation: Moran Prop.Ltd. v Dty Commrs (1940) A.C. 838 at 858; Fox v Bishop of Chester (1824) 6 E.R. 501; ibid (1829) 107 E.R. 520; Westminster Corpn v L & N W Rly (1905) A.C. 426 at 430; Alexander v Braeme (1855) 44 E.R. 205; Luchmeshwar Singh v Barbangha Municipality (1890) 17 I.A. 90 (P.C.); at pr.59 in support of the proposition "What cannot be done directly, cannot be done indirectly" the following cases are cited: South Australia v Commr. 65 C.L.R. 373; Madden v Nelson & Port Sheppard R W. Co. (1899) A.C. 626; Dty.Commr. v Moran Prop. Ltd. 61 C.L.R. 735 at 793 (passage cited); on colourability at pr.61 p.277 citing Att.Gen. v Queen Insurance Co. (1878) 3 A.C. 1090; Russell v Queen (1862) 7 A.C. 829 at 841; [illegible]

32. Ibid at pr. 58 p.276.

This was the opinion of the other judges also,[33] including the minority judges.[34]

But if we take a closer look at the foreign doctrines used by the Supreme Court, we shall be bound to suspect that the Court gave a misleading account of both the doctrine that choses of action cannot be acquired as well as the doctrine of colourable legislation.

It is clearly stated in American Jurisprudence that

> "The power of eminent domain extends to ... choses of action.[35] But under ordinary circumstances, it does not seem that money, which in turn would have to be paid in money, and in many states in advance, could be constitutionally taken by eminent domain, especially by a private corporation, although there may be a great public exigency, as in the time of war, which would authorise the government to take money by eminent domain." 36

Nor is the case of Cincinatti v Louisville etc. Co.[37] an authority for the proposition that rights under a contract cannot be acquired,[38]

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33. Mukherjea J. at pr.84 p.280 quoting Lefroy: Canadian Constitution 79-80 (on colourability); Cooley: II Constitutional Limitations 1113.1113 at pr.82-3 p.280 (on whether choses of action can be acquired). N.C.Aiyar J. at pr.118 p.293 citing Att.Gen. v De Keyser's Hotel (1920) A.C. 508; L N & W Rly v Evans (1893) 1 Ch.16 at 28 (on the rule of construction that compensation must be paid when property is acquired by the Government); at pr.133 p.295-6 citing Long Island Water Supply Co. v City of Brooklyn (1897) 166 U.S. 685; Cincinatti v Louisville etc. Co. (1912) 223 U.S. 390.

34. Shastri C.J. at pr. 3 p.262 Att.Gen. v De Keyser's Royal Hotel (1920) A.C. 508; Central Control Board v Cannon Brewery (1919) A.C. 744 (on constructing statues which acquire property strictly); Das J. at pr.89 p.282 citing Chicago Burlington and Quincy Railroad Co. v Chicago (1897) 166 U.S. 226; Att.Gen. v De Keyser's Royal Hotel Ltd. (1920) A.C. 508 (on payment of compensation; later cited again at pr.91 p.283). Some of the differences in opinion of the minority judges are discussed below.

35. Citing Narragansett Electric Lighting Co. v Sabre 50 R.I. 288 = 66 A.L.R. 1553.

36. 26 American Jurisprudence (2d) 737-8.

37. (1912) 223 U.S. 390. This case is relied by Das J. in A.I.R. 1952 S.C. 252 at pr.99 p.286. Mahajan J. is able to distinguish it at pr.55 p.275 in the briefest possible terms, while N.C.Aiyar J. at pr.135 p.296 pretends that the case did not deal with choses of action at all.

38. See also the case Long Island Water Supply Co. v Brooklyn 166 U.S. 685. The American Constitution (Art 1, S.10) contains a specific provision prohibiting impairments of obligations.

because in that case Lurton J. says

> "the obligation of a contract is not impaired where it is appropriated to public use and compensation paid therefor. Such an execution of powers neither challenges its validity or impairs its obligation."39

Further, in the present case the acquisition was of debts of a somewhat uncertain nature. As Shastri C.J. pointed out :

> " ... It is unrealistic to assume that arrears which had remained uncollected over a period of years during which the zamindar was landlord and had the advantage of summary remedies and other facilities of collection, represented so much money's worth in his hand." 40

Yet, as Das J. pointed out, the State was still willing to pay 50 per cent of this uncertain debt as compensation.[41]

Moreover, this introduction of American principles is a little forced if we remember that the Court was then precluded from examining the statute from the point of view of the eminent domain provisions of the Constitution.[42] They introduced these principles on the far fetched argument that the Legislative Lists preclude the acquisition of choses of action, even though the relevant provisions in the lists[43] make no mention either or eminent domain or of choses of action.

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39. (1912) 223 U.S. 390 at 400.

40. A.I.R. 1952 S.C. 252 at pr.19 p.266.

41. Ibid at pr.100 p.287.

42. See Article 31(2) of the Indian Constitution. This is discussed in Section 5 infra.

43. List II Entry 36: "Acquisition of or requisitioning property, except for purposes of the Union, subject to Entry 42 of List III". Entry 42 of List III lays down: "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or a State or any other public purpose is to be determined and the form and manner in which such compensation is to be paid". Note that the majority did not think that the statute was wanting for lack of public purpose e.g. Mahajan J. at pr.52 p.274 col.1; Mukerjea J. at pr.84 p.280 col.2 sub pr.3.

The Court's use of the doctrine of colourable legislation is equally dubious. The doctrine is a device invented in Canada and Australia because their Constitutions did not contain a Bill of Rights. An authority on the Canadian Constitution has observed :

> "Any wide use of the principle of colourability must deepen suspicion that constitutional limitations are merely the formal means by which Courts pass on the wisdom of legislation." 44

The Indian Supreme Court treated the doctrine as a general device to prevent what the judges felt was an unwarranted exercise of power. This is borne out by the fact that they rely on cases in which individual persons tried to evade the provisions of a statute[45] and cases on delegated legislation.[46] It is submitted that the criteria used in such cases are too narrow to be applied to a sovereign legislature. The Court also, however, relied on some Australian case law[47] and in particular cited passages from Moran Propriety Ltd. v Dty.Commr. for N.S.W.[48]

A closer look at the Australian cases shows that in those cases the doctrine was used where the Commonwealth had enacted statutes which interfered with the functions of the States.[49] Again, in the Moran case[50] the Court was concerned with whether the Commonwealth scheme of legislation discriminated between States in a manner contrary to S.51(ii)

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44. Laskin: A note on Canadian Constitutional Interpretation (1945) V Univ. of Toronto Law Jnl. 171 quoted Merrillat (1970) 210-1.

45. A.I.R. 1952 S.C. 252 at 276 citing Alexander v Braeme (1885) 44 E.R. 205; Luchmeshwar v Darbhanga (1890) 17 I.A. 90.

46. Ibid at p.276 col. 1 citing Fox v Bishop of Chester (1824) 107 E.RR 520 at 527.

47. Ibid at 276 citing South Australia v Comm. 65 C.L.R. 373; Madden v Nelson & Port Sheppard R W Co. (1899) A.C. 626.

48. Moran Propriety Ltd. v Dty. Commr. of Taxation (1940) A.C. 838 at 858; In the Australian High Court at 61 C.L.R. 735 at 795.

49. e.g. South Australia v Comm. (supra f.n.47) See comment Wynes (1970) (4d) 32-33.

50. Supra at f.n.48.

of the Constitution, and the Privy Council and the High Court both found that the impugned scheme was in fact satisfactory. Mahajan J. also omits to mention that Evatt J. who he quoted from was a minority judge when the issue was decided in the High Court.[51] It appears that even in Australia the doctrine is used to keep the Commonwealth within the powers granted to it by the Constitution and not to check any unreasonable exercise of power.

The Indian Supreme Court misconstrued these concepts in order to acquire a power of review where none existed. The reason for this might lie in the facts of the particular cases before them.

ii (c). The Facts of the Case before them.

Mahajan J. was very troubled by the fact that in Writ Petition No. 229 the arrears were Rs.3,981,867, in No. 330 Rs. 1,026,103, in No. 339 Rs. 952,937[52] and that in Ptn. 229 the appellant would get nothing but pay Rs. 600,000 to the State, in Ptn. 330 the estate would be acquired free and in Ptn. 331 the petitioner would get a mere Rs.14,000.[53] The minority made similar observations.[54] These figures were made possible because of the deductions in S.23 (f) (which the majority also invalidated as a colourable exercise of power) whereby the State could deduct from the gross assets such sums as the petitioners should have incurred to preserve works of benefit on their estate. The majority thought that in view of the fact that some landlords had spent nothing a flat rate of deduction was unfair,[55] whereas the minority

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51. 61 C.L.R. 735 at 795 (per Evatt J.).

52. A.I.R. 1952 S.C. 252 atpr.56 p.274.

53. Ibid at pr.57 p.275.

54. Ibid. See Das J. at pr.96 p.286 col.1.

55. Ibid Mahajan J. at pr.34 p.270; Mukerjea J. at pr.76 p.279 (approving of Mahajan'J's arguments).

cited a Privy Council decision to show that the landlords were obliged to make such expenditure and that such deductions were therefore in order.[56]

But if the facts justified intervention, why did not the majority interfere in the companion cases of Visheshwar v M.P.[57] and Surya Pal Singh v U.P.[58]? In the former case despite the assertion that arrears were left in the hands of the landlords and there is no artificial reduction of the gross assets,[59] it is clear from the judgement that a compensation of Rs. 2,500,000 was reduced to Rs. 65,000

> "payable in thirty unspecified instalments and therefore ... purely nominal and illusory" 60

Again in the latter case the Court admitted that an estate of Rs.2,409,705 was being acquired for Rs. 208,000 even though it fetched an annual income of Rs. 25,915.[61] It is clear that what inspired the Court to misconstrue and then apply foreign doctrines was less the facts of the cases before them than the need to make a gesture that they would not easily allow the Government to prevent them reviewing provisions which openly violate the principles of cosmopolitan jurisprudence.

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56. Ibid Shastri C.J. at pr.20 p.266 citing the Privy Council case of Madras Rly Co. v Maharaja of Carvatenagaram (1876) I I.A. 364.

57. (1952) S.C.R. 1020.

58. (1952) S.C.R. 1056.

59. (1952) S.C.R. 1020 at 1029-30. But note the admission at p.1028 that deductions were made.

60. Ibid at 1030-31. He stresses that the annual income of the estate was Rs. 565,000 and that Rs. 65,000 was not really compensation.

61. (1952) S.C.R. 1056 at 1070.

This is made even more apparent by the fact that in Gajapati v Orissa[62] decided in the very next year, Mukerjea J. for a unanimous Court, cut down severely the extended interpretation given to the doctrine of colourable legislation. In Kameshwar v Bihar[63] which was treated as merely having decided

> "that the subject matter of legislation did not fall within the ambit of Item 42 of List III Schedule VII" 64

Mukerjea J. stressed that the doctrine of colourable legislation was concerned solely with the competence of the legislature.[65] He acknowledged that in the case before him the Orissa Agricultural (Amendment) Act 1950 taxed the property at the rate of 12as.6p. in the rupee[66] but added :

> "Under E.42 List III, which is a mere head of legislative power, the legislature can adopt any principle of compensation in respect of the property compulsorily acquired. Whether the deductions are large or small, inflated or deflated, they do not affect the constitutionality of the enactment under this entry ... The fact that the deductions are unjust, exorbitant or improper does not make the legislation invalid, unless it is shown to be based on something unrelated to the facts." 67 (emphasis mine)

This is clearly inconsistent with the extremely wide doctrine used in

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62. A.I.R. 1953 S.C. 375.

63. A.I.R. 1952 S.C. 252

64. A.I.R. 1953 S.C. 373 at pr.14 p.380.

65. Ibid at pp.379-80 citing Cooley: I Constitutional Limitations 379; Att. Gen. v Reciprocal Insurers (1924) A.C. 328; Lefroy: Canadian Constitution 75; A.G. for Alberta v A.G. for Canada (1939) A.C.117 at 130; Union Colliery etc. Ltd. v Bryden (1899) A.C. 580; Re Insurance Act of Canada (1932) A.C. 41; Moran v Dty. Commr. (1940) A.C. 838.

66. Ibid at pr.17 p.38.

67. Ibid at pr. 18.

Kameshwar v Bihar.[68] It is no accident that later cases[69] discussing the doctrine of colourable legislation refer to Gajapati v Orissa[70] rather than Kameshwar v Bihar.[71] In fact the doctrine was hardly used by the Court later, except in one controversial 1962 case.[72]

After Kameshwar v Bihar the Supreme Court upheld all the statutes connected with agrarian reform that came before it.[73] The only exception to this was Raghubir v Court of Wards[74] where Mahajan J. declared S.112 of the Ajmer Tenancy and Land Records Act (42 of) 1950 was entitled to the protection of Article 31A. That section "suspended" the rights of a landlord who infringed the tenant's rights and Mahajan J. held that a "suspension" was not a modification within the meaning of Article 31A.[75] But the authority of this case is doubtful and it has been distinguished in later cases.[76]

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68. A.I.R. 1952 S.C. 252.

69. See Zamindar of Ettayapuram v Madras A.I.R. 1954 S.C. 257 read with the companion case Verranna Chettiar v Madras A.I.R. 1954 S.C. 605; V.P. v Moradhwaj A.I.R. 1960 S.C. 796 at pr.6 pp.799-800; Sonapur Tea Estate Co. v Bihar A.I.R. 1962 S.C. 137 at pr.9 p.140; Kunhikoman v Kerala A.I.R. 1962 S.C. 723 at pr.4-5 p.727.

70. A.I.R. 1952 S.C. 375.

71. A.I.R. 1952 S.C. 252.

72. See Maharaja Jayyant Singhji v Gujerat A.I.R. 1962 S.C. 821 where the question was not concerned with legislative power at all but whether the statute had the protection of Art.31A. The statute reduced the compensation due to tenants by changing their status from non-permanent to permanent. In any case the doctrine of colourability was used only as an alternative argument (see the first sentence of pr.14 p.833); Note also the dissent of Sarkar and Mudholkar JJ and see Seervai: (1967) 571-2 where the majority is supported on merits.

73. See Dhirubha Devi v Bombay A.I.R. 1955 S.C. 47 (which upheld the Bombay Taluqdari Abolition Act (62 of) 1949; Amar Singh v Rajasthan A.I.R. 1955 S.C. 504 (upheld the Rajasthan Resumption of Jagirs Act 1952); Kamakshya v Collector A.I.R. 1956 S.C. 63; Bhairebendra v Assam A.I.R. 1955 S.C. 504.

74. A.I.R. 1953 S.C. 373.

75. Ibid at pr. 10.

76. See Atma Ram v Punjab A.I.R. 1959 S.C. 519 at pr.13 p.528
Ranjit Singh v Punjab A.I.R. 1965 S.C. 632 at pr.11 p.637.

TABLE III showing voting patterns amongst the judges in the cases on impugned statutes connected with agrarian reform.

Name of Judge	Total number of votes cast	Votes in favour of impugned statutes	Votes against impugned statutes
Shastri	4	4	-
Mahajan	7	5	2
Mukerjea	9	7	2
Das	9	9	-
N.C.Aiyar	3	2	1
Bose	4	4	-
Hasan	4	3	1
Bhagwati	3	2	1
Jaganadhdas	3	2	1
T.L.V.Ayyar	4	4	-
Sinha	1	1	-
Imam	3	3	-
Totals	54 ==	46 ==	8 =

We will see that all the judges voted in favour of the statutes before them. The only exceptions were Mahajan (who wrote 2 leading judgements in the cases which invalidated statutes), Hasan, Bhagwati and Jaganadhdas (who merely subscribed to Mahajan J.'s judgement in Raghubir v Court of Wards (which turned, as we have seen, on a technical point), N. C. Aiyar (who followed Mahajan J.'s lead in Kameshwar v Bihar) and Mukerjea J., who followed Mahajan J.'s lead in the two cases in which statutes were invalidated, but later changed his mind and drastically limited the broad doctrine of colourability, before it could

make serious inroads into the programme of agrarian reform.

As a result of the Court's protest E.42 of List III was amended.[77] Further, the doctrine that choses of action cannot be acquired became a part of Indian law.[78] This is a clear example of evolving "non-neutral principles"[79] in interpreting the Constitution, simply because the Court wanted to deal with the facts of the instant case and register its disapproval of the Government's policy of abandoning the accepted principles of Anglo-American jurisprudence.

After 1960, the Court imposed yet another test which gave it a limited power of review over statutes connected with agrarian reform. But this time they relied more on original techniques rather than cosmopolitan principles.

iii. The second decade and the agrarian reform tests.

After 1960, the Court did not use foreign doctrine to acquire a power of judicial review over statutes connected with agrarian reform. Instead Subba Rao J. made a reference to the Statement of Objects and Reasons of the Fourth Amendment and concluded that in order to get the protection of Article 31A the statute in question must in fact be connected with agrarian reform.[80]

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77. Seventh Amendment Act 1956.

78. See Chapter II (supra) discussing Randji Rao Shinde v M.P. A.I.R. 1968 S.C. 1053.

79. This term is explained in Chapter II, Section 3 (supra).

80. See Merrillat (1970) Chapter 8 pp.172-183 particularly 178 ff. Atul M.Setalvad: Article 31A(1)(a) and the Supreme Court (1965) 67 Bom.L.R.Jnl. 105; Seervai (1967) 538-544; D.Narasuraju: Argrarian reform (in G.S. Sharma (ed.) Property Relations in Independent India) 131-146 particularly from 140ff.; M.P.Jain: Property Relations in Independent India (1967) 3 Ban.J. Jnl. 28 at 63-5.

The techniques used are inconsistent and of doubtful validity. What the Court did in fact was to convert a rule of construction (i.e. all statutes connected with agrarian reform must be liberally construed) into a test of validity (i.e. all statutes which are not connected with agrarian reform will not be protected under the provisions of Article 31A). But even this test, which in its own terms must apply universally,[81] has been selectively and inconsistently applied.

Given below is a Table showing the voting and judgement writing patterns in the sixteen cases connected with agrarian reform between 1959 and 1969.

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81. This is clearly laid down by Hidayatuallah J. in Gullabhai v Union A.I.R. 1967 S.C. 1110 at pr.6 p.1112.

TABLE IV showing the judgement writing and voting patterns in the cases connected with agrarian reform 1959-1969.

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Das C.J.	v	v	v													
Bhagwati	*	v	v													
Sinha	v	*	v	v	v	v	v									
Imam				v	+											
Kapur						v		v				v				
Gajendragadkar						v			*	v						
Sarkar				v	x		v		v							
Subba Rao	v	v	v		*	v		*			*	v	v	v		
Wanchoo	v	v	*	*		*			v	v	v				v	
Hidayatullah								v		*	v	*	*	v		v
Das Gupta							*		v	v						
Ayyangar							v		v	v						
Shah				v	v			v				v	v			v
Dayal								v			v	v				
Mudholkar								v								
Sikri											v		v	v		
Bachawat															*	
Ramaswami														v	v	*
Shelat													v	*		
Mitter															v	v
Hedge															v	
Grover																v

v = participation. + = dissent without judgement.

x = dissent with judgement. * = judgement (majority).

5 etc. = cases in which tests of agrarian reform used.

1 = Sri Ram v Bombay A.I:R. 1959 S.C. 59.

2 = Atma Ram v Punjab A.I.R. 1959 S.C. 519

3 = Raghubir v Punjab A.I.R. 1959 S.C. 475

4 = V.P. v Moradhwaj A.I.R. 1960 S.C. 728

5 = Kochunni v Madras A.I.R. 1960 S.C. 1080

6 = Gangadhor v Bombay A.I.R. 1961 S.C. 288

7 = Bihar v Rameshwar Pratap A.I.R. 1961 S.C. 1649

8 = Bihar v Umesh Jha A.I.R. 1962 S.C. 50

9 = Sonapur Tea Estate v Dty Commr. A.I.R. 1962 S.C. 137

10 = Ranjit Singh v Punjab A.I.R. 1960 S.C. 632

11 = Vajravelu v Spl. Dty. Collector A.I.R. 1965 S.C. 1017

12 = Mahant Sankarshan v Orissa A.I.R. 1967 S.C. 59

13 = Gulabhai v Union A.I.R. 1967 S.C. 1110

14 = U.P. v Amand Bihari A.I.R. 1967 S.C. 661

15 = Dty Commr. v Duryanath A.I.R. 1968 S.C. 394

16 = B. Shankar Rao v Mysore A.I.R. 1969 S.C. 453

It will be clear from the Table that the Court used the agrarian reform test in only 6 of the 16 cases on agrarian reform in which the test could have been applied. In actual fact the test was created by Subba Rao J. by some doubtful techniques, in an exceptional case in 1960,[82] and conveniently forgotten till 1965[83] when Subba Rao J. made a skilful manoeuvre to reintroduce it. Let us examine the case law.

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82. In Kochunni v Madras A.I.R. 1960 S.C. 1080.

83. See Vajravelu v Sp.Dty Collector A.I.R. 1956 S.C. 1017 and Subba Rao J.'s handling of Ranjit Singh v Punjab A.I.R. 1965 S.C. 332 in which Hidayatullah J. had exposed Subba Rao J.'s use of techniques in Kochunni v Madras A.I.R. 1960 S.C. 1080.

In the first four cases decided in 1959 and 1960, the Court merely tried to establish a rule of construction that Article 31A must be liberally construed.[84] A typical and oft-quoted statement of the attitude of the Court was made by Sinha C.J. in Atma Ram v Punjab[85]:

> "Keeping in mind the fact that Article 31A was enacted by two successive amendments - one in 1951 (First Amendment) and the second in 1955 (Fourth Amendment) - with retrospective effect in order to save legislation affecting agrarian reform, we have every reason to hold that those expressions (used in Article 31A) have been in their widest amplitude, consistent with the purpose behind those amendments." 86

But he added

> "provided, however that such a construction does not involve violence to the language actually used." 87

The Court maintained this attitude in other cases,[88] but no suggestion was made that a connection with agrarian reform was itself a test to ascertain whether a particular statute fell within the provisions of Article 31A.

In Kochunni v Madras[89] a new development took place. The Madras legislature passed the Marumakkattayam (Removal of Doubts) Act 1955 to give the junior members of a tarwad a right to enforce a partition of certain properties which had been declared impartible by a Privy Council decision in 1943.[90]

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84. Sri Ram v Bombay A.I.R. 1959 S.C. 459; Atma Ram v Punjab A.I.R. 1959 S.C.519; Raghubir v Punjab A.I.R. 1959 S.C. 475; V.P. v Moradhwaj A.I.R. 1960 S.C. 796.

85. A.I.R. 1959 S.C. 519.

86. Ibid at pr.11 p.526 col.2.

87. Ibid at pr.11 p.526 col.2.

88. e.g.Bhagwati J. in Sri Ram v Bombay A.I.R. 1959 S.C. 459; referring to the Preamble of the Constitution, the Directive Principles of State Policy (at pr.7 p.462) the socialist nature of the statute (at pr.36 p. 469) and the need to give it a wide interpretation (at p.463 col.2); Wanchoo J. in Raghubir Singh v Ajmer A.I.R. 1959 S.C. 475 at pr.3 p.477-8 (where the Court upheld the power of the Collector to cancel leases made by landholders in anticipation of agrarian reform); Wanchoo J. in V.P. v Moradhwaj A.I.R. 1960 S.C. 796 at pr.3 (where he referred to all the earlier cases on agrarian reform from Kameshwar v Bihar (1952) to Atma Ram v Punjab (1959) but no mention is made of an agrarian test).

89. A.I.R. 1960 S.C. 1080.

90. Kochunni v Madras A.I.R. 1949 P.C.47 read with the Madras Marumakkatayam Act, 1932.

It was clear that this statute was not really connected with the purposes of agrarian reform, but at the same time it was clear that, technically saved by the terms of Article 31A the property involved fell within the definition of the term "estate" in Article 31A(1)(a). Subba Rao J. for the majority evolved the test that statutes that seek the protection of Article 31A must be connected with agrarian reform. The reason for his doing so can be found in his belief that

> "(f)undamental rights have a transcendental position in our Constitution ... (which) describes certain rights and places them in a separate Part." 91

He talked of the "solemn obligation" placed by that Part on the Court[92] and stressed that a welfare state must be found within the framework of the Constitution.[93] But this in itself would not have justified the introduction of a superadded test of agrarian reform, which did not derive from the text of the Constitution. He therefore relied on two techniques. Firstly, he referred to the 1959 cases[94] and in particular to a passage from Atma Ram v Bombay[95] to make the conclusion :

> "This Court had therefore recognised that the Amendment inserting Article 31A in the Constitution and subsequently amending it, were to facilitate agrarian reforms ..." 96

From this he made the unwarranted conclusion that those cases laid down

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91. A.I.R. 1960 S.C. 1080 at pr.22 p.1089.

92. Ibid at pr.24 p.1091 (quoting from Bhagwati J. in Basheshwar Nath v Commr. A.I.R. 1959 S.C. 149 at 161 - a case on waiver of fundamental rights and not directly relevant).

93. Ibid at pr.31 p.1096.

94. Sri Ram v Bombay A.I.R. 1959 S.C. 459; Atma Ram v Punjab A.I.R. 1959 S.C. 519

95. Atma Ram v Punjab A.I.R. 1959 S.C. 519 at 526.

96. A.I.R. 1960 S.C. 1080 at pr.17 p.1088.

that statutes taking refuge under Article 31A must be connected with agrarian reform and regulate the relationship between a landlord and tenant, which the statute in the present case did not.[97] The second technique was to refer to the Statement of the Objects and Reasons of the Fourth Amendment Act 1955 to reinforce the conclusion that the Amendment was to advance the cause of agrarian reform.[98] Subbarao J. (and Sarkar J. for the minority) stressed that this reference to the Statement and Objects was not really permissible.[99] Further, Hidayatullah J. showed years later that Subbarao J. had in fact quoted selectively from the "Statement" and missed out a vital portion[100] which read :

> "the proper planning of urban and rural areas requires the beneficial utilisation of vacant and waste lands and the clearance of slum areas."

By the use of such methods as these the Court was able to convert a rule of construction into an agrarian reform test.

Sarkar J. (for Imam J. and himself) following Sinha C.J.'s warning that the text of the Constitution should not be violated, thought that Subbarao J.'s conclusions were not justified and observed :

> "The article does not mention any agrarian reform. Under it any jamman right may be acquired, extinguished or modified; this would be so whether the land was agricultural land or land which had never been used for agricultural purposes." 101

What is even more significant is the fact that in the four cases[102] that

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97. Ibid at pr.19 p.1089.

98. Ibid at pr.15 p.1086.

99. Subbarao J. at pr.15 p.1086-7 citing Ashwini Kumar v Arabinda Bose A.I.R. 1952 S.C. 369; Sarkar J. at pr.74 p.1108.

100. Hidayatullah J. in Ranjit Singh v Punjab A.I.R. 1965 S.C. 632 at pr10. p.637.

101. A.I.R. 1960 S.C. 1080 pr.73 p.1103.

102. Wanchoo J. in Gangadhar v Bombay A.I.R. 1961 S.C. 288; Das Gupta J. in Bihar v Rameshwar Pratap A.I.R. 1961 S.C. 1649; Subbarao J. in Bihar v Umesh Jha A.I.R. 1962 S.C. 50; Gajendragadkar J. in Sonapur Tea Estate Co. v Dty Commr. A.I.R. 1962 S.C. 137.

followed Kochunni's case, no mention was made of the agrarian reform test, even though the judgement in one of them was written by Subba Rao J. himself.[103] The Court accepted the view of the 1959 cases that Article 31A must be strictly contrued but went no further than that.[104] In Bihar v Rameshwar Prashad[105] the Court, replying to an argument that the impugned statute merely augmented the revenues of the State and was lacking in public purpose,[106] observed :

> "That however is no reason to think that this legislation is is not also concerned with agrarian reform. It is, however, unnecessary for us to consider whether it is a law as regards land reform or not, it is clearly and entirely as regards acquisition of property." 107

Kochunni v Madras[108] was a forgotten case until Ranjit Singh v Punjab[109] where Hidayatullah J. made clear that the former case was a very special one and

> "(t)here is reason to think that the Kochunni case was regarded on other occasions too as one decided on its facts." 110

He stressed that the reference to the Statement and Objects was of doubtful validity[111] and showed that Subba Rao J. had misquoted a portion of the Statement to suit his own purposes.[112] Hidayatulla J. supported the use of the agrarian reform test in Kochunni's case, where he thought the

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103. Bihar v Umesh Jha A.I.R. 1962 S.C. 50.

104. See Sonapur Tea Estate Co. v Dty Commr. A.I.R. 1962 S.C. 137 at pr.8 p.140 citing the 1959 cases.

105. A.I.R. 1961 S.C. 1649.

106. Ibid at pr.6 p.1651; pr.8 p.1652.

107. Ibid at pr.6 p.1651.

108. A.I.R. 1960 S.C. 1080

109. A.I.R. 1965 S.C. 632

110. Ibid at pr.11 p.637 col.2.

111. Ibid at pr.10 p.637.

112. Ibid at pr.10 p.637.

statute did not fall under Article 31A "however liberally construed ..." but felt that the test would not apply

> "to cases where the general scheme of legislation is definitely agrarian reform and under its provisions something ancilliary there to rural economy has to be undertaken to give full effect to the reform." 113

Kochunni's case was thus treated as a special case and the agrarian reform test was obviously to be sparingly used.

Subba Rao J. came to consider these comments in Vajravelu v Sp. Dty Collector,[114] where he held that the Land Acquisition (Madras Amendment) Act 1961 enacted for purposes of slum clearance was not connected with agrarian reform. He did not even enquire whether the lands in question were "estates" within the meaning of Article 31A, and used the agrarian reform test before even considering whether the Article applied or not.[115] Faced with Hidayatulla J.'s judgement in Ranjit Singh's case he observes :

> "That judgement accepts the view that Article 31A was enacted to implement agrarian reform, but has given a comprehensive meaning to the expression 'agrarian reform', so as to include provisions made for the development of the rural economy." 116

In an effort to restore the agrarian reform test he omits to mention that some of the land was situated in rural areas[117] and that slum clearance fell within that portion of the Statement of Objects and Reasons of the Fourth Amendment Act 1955 which he had forgotten to cite in Kochunni's case.[118]

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113. Ibid at pr.12 p.638. Note the extremely wide view of agrarian reform at pr.13-4 pp.638-9.

114. A.I.R. 1965 S.C. 1017.

115. Ibid at pr.10 p.1021 col.1 "From the material on record we cannot definitely hold whether the lands in question are held under ryotwair settlement."

116. Ibid at pr.10 p.1022.

117. This is quite apparent from the recital of facts in pr.1 p.1019.

118. They are however mentioned in another context at pr.10 p.1021.

Hidayatullah J. was a party to this case, but did not complain at Subbarao J.'s obvious distortion of his judgement. The explanation for this may well lie in the fact that four years later Hidayatullah J. freely admitted in another context that he thought the judgement in this case belonged to another case decided by the same Bench on the same day.[119] What lends credibility to this view is the fact that Hidayatullah J. himself does not refer to the agrarian reform test in Mahant Sankarshan v Orissa[120] where he wrote the judgement of the Court.

But the test had come to stay, for in Gulabhai v Union[121] Hidayatullah J. writing the judgement for a unanimous Court held that certain sections of the Daman (Abolition of Proprietorship of Villages) Regulation (27 of) 1962 was not protected by Article 31A, which was construed as having laid the following two-fold test :

> "We have to consider first if the interest abolished comes within the compendious definition of 'estate' in Article 31A ... Next we have to consider whether the Regulation is a piece of agrarian reform in the public interest. Justification for the abolition of estates has been held by this Court to involve agrarian reform in the public interest." 122

This appears strange if we consider the fact that the first test was not applied in Vajravelu's case[123] and that Hidayatullah J. himself had not applied the second test in Mahant Sankarshan v Orissa[124] Again no mention was made of the test in two cases from Punjab[125] even though both Hidayatullah and Subbarao JJ wrote minority and majority judgements in them.

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119. See Hidayatulla J.'s observations in Gujerat v Shantilal A.I.R. 1969 S.C. 634 at pr.1, a case on compensation and unconnected with agrarian reform.

120. A.I.R. 1967 S.C. 59.

121. A.I.R. 1967 S.C. 1110.

122. Ibid at pr.6 p.1112.

123. A.I.R. 1965 S.C. 1017.

124. A.I.R. 1967 S.C. 59.

125. See Ajit Singh v Punjab A.I.R. 1967 S.C. 856; Pritam Singh v Punjab A.I.R. 1967 S.C. 930.

But gradually the Court came to accept the existence of the "agrarian reform" test and it was used by Sikri J. in U.P. v Anand Brahma[126] without citing any of the earlier case law. In Durganath v Dty. Commr.[127] Bachawat J. writing the judgement for the Court held that the Assam Acquisition of Land for Flood Control and Prevention of Erosion Act (16 of) 1955 was not connected with agrarian reform.

> "The Act is a purely expropriatory measure. It provides for acquisition of lands both urban and agricultural for executing works in connexion with flood control or erosion. A piece of land acquired under the Act need not be an estate or part of an estate. It has no relation to agrarian reform, land tenures and elimination of intermediaries. We may add that there is nothing on the record to show that the respondent's lands are estates or part of estates." 128

Once again the Court had decided the issue of agrarian reform before they had even considered whether the land was technically within the purview of Article 31A or not. By limited the meaning of agrarian reform to problems of land tenures and the elimination of intermediaries, the Court bought to prevent the use of Article 31A for anything other than Zamindari abolition. The test has become a normal feature of the Court's techniques, even though it is not always used.[129]

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126. A.I.R. 1967 S.C. 661 at pr.14 and 14 p.664. See also B.Sharkara Rao v Mysore A.I.R. 1969 S.C. 453 at pr.9 (where a casual mention was made of land tenures even though Vajravelu v Dty Sp.Collector A.I.R. 1965 S.C.1017 was mentioned in another and not this context).

127. A.I.R. 1968 S.C. 394. He cites the following cases: Kochunni v Madras A.I.R. 1960 S.C. 1080; Ranjit Singh V Punjab A.I.R. 1965 S.C. 632; Vajravelu v Sp.Dty Collector A.I.R. 1965 S.C. 1017.

128. Ibid at pr.7 p.399 col.1.

129. The test was not mentioned in Kalanki Devi v N.R.T.Kannur A.I.R. 1970 S.C. 439 (see pr.6 p.442); Mother Provincal v Kerala A.I.R. 1970 S.C. 2079; S.N.Medhi v Maharashtra A.I.R. 1971 S.C. 1992 (see pp.1996-7); Khajamian Waqf Estates v. Madras A.I.R. 1971 S.C. 161 (see pp.164-5); Victor v Francis A.I.R. 1971 Ker.168 (F.B.); M.K.Thayal v State A.I.R. 1971 Ker.65 (but note suggestion at p.73 that Art.31A is different from Art.31B). But the test was mentioned in Mudaliar v Madras A.I.R. 1971 S.C. 989 at pr.6 p.991; Narayan Nair v State A.I.R. 1971 Ker.93 (F.B.), see pr.10 p.106; pr.98 p.126); G.R.Vaghela v C.Subbarav A.I.R. 1971 Guj.131 at 139-40; Krishna Pillai v Sankara Pillai A.I.R. 1971 Ker.295 (where the Court invalidated Kerala Hand Reform Act (1 of) 1964 as not protected by Article 31A see pr.5 p.297-8; and Mathew J. at pp.303-4).

The essential technique is the basic doctrine of English administrative law that a power must not be used for purposes other than for which it is given. But the agrarian reform test is clearly an invention of the Court, achieved by reference to the Statement of Objects of an Amendment Act, and by erratic voting behaviour.

The voting behaviour is shown in Table V below.

TABLE V showing voting patterns in cases which considered the Agrarian Reform Test.

	I	II		III		IV	
	A	B	C	D	E	F	G
Das	3	-	-	3	-	-	-
Bhagwati	3	-	-	3	1	-	-
Sinha	7	1	-	6	1	-	-
Imam	2	-	-	1	-	1	-
Kapur	3	-	-	3	-	-	-
Gajendragadkar	3	1	-	2	1	-	-
Sarkar	4	-	-	3	-	1	1
Subbarao	10	3	2	7	1	-	-
Wanchoo	9	3	-	6	3	-	-
Hidayatullah	7	4	2	3	1	-	-
Das Gupta	3	1	-	2	1	-	-
Mudholkar	1	-	-	1	-	-	-
Ayyangar	3	1	-	2	-	-	-
Shah	6	3	-	3	-	-	-
Dayal	3	1	-	2	-	-	-
Sikri	3	2	-	1	-	-	-
Bachawat	1	1	1	-	-	-	-
Ramaswami	3	2	1	1	-	-	-
Shelat	2	1	-	1	1	-	-
Mitter	2	2	-	-	-	-	-
Hegde	1	1	-	-	-	-	-
Grover	1	1	-	-	-	-	-
Total	80	28	6	50	10	2	1

Column I gives total votes cast.
Column II participation in judgements where test used.
Column III participation in cases where test not used.
Column IV participation in cases where test rejected.

Columns B, D, F show "vote"
Columns C, E, G show number of judgements delivered.

It will be clear that the agrarian reform test was adopted even though only 28 out of 80 votes were cast in favour of it. Further we shall see that two judges (Sarkar and Imam JJ.) voted against the test; 4 judges (Das, Bhagwati, Kapur and Mudholkar JJ.) participated in decisions which did not use the test; 12 judges (Sinha, Gajendragadkar, Subbarao, Wanchoo, Hidayatullah, Das Gupta, Ayyangar, Shah, Dayal, Sikri, Ramaswami and Shelat) participated both in decisions which used the test and those which did not; 4 judges (Bachawat, Mitter, Grover and Hegde JJ.) consistently used the test and only 4 judges (Subbarao, Hidayatullah, Bachawat and Ramaswami JJ.) wrote judgements supporting the use of the test.

Thus we can see that the test became law even though a majority of the cases and judges do not apply it consistently. We cannot discover the extent to which the judges fully subscribed to the judgements on the agrarian reform test. Certainly one judge (Ayyangar J.) wrote a judgement in a case in which he disapproved of using extrinsic aids to interpret the provisions of Article 31A.[130] But what is clear is the fact that Subbarao J. relied on his position as judgement writer to introduce the test in controversial cases like Kochunni v Madras[131] and Vajravelu v Sp. Dty Collector[132] (where the case involved other controversial points[133]) which may have clouded the agrarian reform issue.

An explanation for this can be found in the desire of the Courts to regain the power of review which was taken away from them by

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130. See his judgement Purshottam v Kerala A.I.R. 1962 S.C. 694 at pr.66 p.722.

131. A.I.R. 1960 S.C. 1080.

132. A.I.R. 1965 S.C. 1017.

133. The main issue was about the meaning of the word "compensation" and the agrarian reform was treated merely as a preliminary point.

Constitutional Amendment. This trend is obviously a prelude to the famous case of Golak Nath v Punjab,[134] where, led by Subba Rao J., it attacked the Constitutional Amendments themselves. The techniques used by the Court are not consistent.

iv. The cases leading to the Seventeenth Amendment - an example of mechanical construction.

In striking contrast to the above cases are the Court's techniques in the three cases[135] which led to the Seventeenth Amendment. In these cases the Court rested their decision purely on the text of the Constitution and the capacity of Indian judges to interpret the Constitution literally. The question was whether a "ryotwari tenture" was included within the meaning of the term "estate" in Article 31A. The Constitution merely lays down that the term shall be defined with reference to the "local law".

In Purshottam v Kerala[136] "local law" had not defined "estate", and the problem was whether the Amendments which were passed with the object of abolishing intermediaries could apply to "ryotwari" tenures, which involved no intermediaries. Ayyangar J. (the minority judge) thought that they did not, but unlike Subba Rao J. did not refer to the Statement of Objects and Reasons[137] but rather to the fact that the tenures mentioned in Article 31A (2)(a) and (b) must be read together and the latter mentioned a catalogue of interests in land ending with the words "any other intermediary". But Gajendragadkar J. who read the majority judgement relied on earlier case law to show that Article 31A

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134. A.I.R. 1967 S.C. 1643

135. Purshottam v Kerala A.I.R. 1962 S.C. 694; Kunhikoman v Kerala A.I.R. 1962 S.C. 723; Krishnaswami v Madras A.I.R. 1964 S.C. 1515.

136. A.I.R. 1962 S.C. 694.

137. Ibid at pr.66 p.722. But note his reference to the Joint Select Committee to which the Bill was referred at pr.56 p.718.

must be given a liberal interpretation[138] to conclude that the tenures were estates within the meaning of the Article.[139] This case is a clear example of two possible interpretations of the Constitution without any reference to foreign doctrine and without distorting traditional methods of interpretation.

At the same time the Court also decided the case of Kunhikoman v Kerala[140] in which the Court was dealing with land which had belonged to the Madras state before the States Reorganisation Act 1956. In the Madras State the "ryotwari tenure" had not been included in the definition of "estate" given in the Madras Estates Land Act 1908. Wanchoo J. for the majority[141] (which included Gajendragadkar J.) thought that this concluded the point and held that a ryotwari tenure in that part of Kerala which was originally a part of Madras not being included in the local law was not protected by Article 31A. This decision was followed with respect to ryotwari tenures in Madras in Krishnaswami v Madras[142] where once again Wanchoo J. read the judgement, but this time for a unanimous Court which included Gajendragadkar and Ayyangar JJ.

Having removed the protection of Article 31A from certain ryotwari tenures, the Court held the impugned statutes void from the point of view of Article 14 mainly because they provided a graduated basis of compensation which gave the poor and smaller holders a proportionately larger compensation than the larger tenure holders. The Court applied

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138. At pr.24 p.705 col.2 later citing Sri Ram v Bombay A.I.R. 1959 S.C. 459; Mahadeo v Bombay A.I.R. 1961 S.C. 1517; Bihar v Rameshwar A.I.R. 1961 S.C. 1649.

139. Note the learned judge's discussion of the local law declared by the ruler of Cochin in March 1905.

140. A.I.R. 1962 S.C. 723.

141. Sarkar J. wrote a separate judgement on another point, and Ayyangar J. stuck to his reasons given in Purshottam's case.

142. A.I.R. 1964 S.C. 1515

the routine equality test contained in Article 14, without paying any attention to Sarkar J.'s dissent which stressed that if a graduated basis for taxation was acceptable, a graduated basis for compensation ought to be acceptable.[143]

What the Court had done was simply to follow a literal interpretation of the Constitution to achieve the anomalous result that a ryotwari tenure was within the meaning of "estate" in Kerala but not in Madras or areas which had originally belonged to the State of Madras. This led to the Seventeenth Amendment Act 1964 whereby ryotwari tenures were specifically included within the scope of Article 31A and 44 more statutes were given the protection of the Ninth Schedule of the Constitution. The judges who decided these cases had simply followed the techniques of literal interpretation which they had inherited from English law without paying adequate attention to the nature of the ryotwari tenure. They appear to have mechanically applied the provisions of the Constitutional Amendments without considering the wider problems of agrarian reform, which had given rise to the Amendments in the first place.

v. Conclusion

If we consider the Court's performance in the area of agrarian reform, we see a Court chagrined by the fact that Constitutional Amendment had deprived them of the power to review statutes which obviously violated the principes of cosmopolitan jurisprudence. In order to remedy this the Court made the gesture of trying to re-introduce respect for these principles by the use of any Western techniques and ideas which lay to their hands. The Court was inspired to do this by Mahajan J. but lacked the courage and conviction to use these techniques to preserve a sustained power of review. It therefore fell back on the doctrine of

143. See Kunhikoman v Kerala A.I.R. 1962 S.C. 723 at prs.34-36 p.740 Col.2.

literal interpretation,(conceivably a misuse of normal statutory methods of interpretation) and invented the agrarian reform test to check an unlimited exercise of legislative power and contain the use of the power given by the Amendments for the limited purpose of abolishing traditional land tenures. The result was obtained by a strange and inconsistent voting pattern, which is becoming a normal feature of the Court's practice to achieve a particular result. The technique (which Subba Rao J. appears to have mastered) consists of introducing broad propositions of law in special cases and allowing them to ripen until they can be brought out into the open, to be used more freely. Although this technique has worked effectively in achieving the desired result it gives a curious impression when used by the highest Court which has an unlimited power to reconsider earlier decisions or set aside the decisions of the Court below.

As a result of inconsistent voting patterns and the lead taken by the judgement writers, the Court has collectively laid down a policy of intervention where none was intended either by the Constituent Assembly or the text of the Constitution. Further the Court has made no effort to understand the agrarian system of India or taken note of the fact tradition accords to the State an extended control of the land system which the Amendments sought to preserve. The Court in an attempt to preserve its own status and cosmopolitan principles (whose relevance it had assumed without examination) has made a bid to controvert the alliance between tradition and socialism and to acquire for itself, the lawyer and the Western concept of property, a more meaningful role than any of them were intended to play.

5. The Supreme Court and the Doctrine of Eminent Domain.

Article 31 (2) of the Indian Constitution incorporates certain provisions which resemble the American doctrine of eminent domain.[1] Accordingly an acquisition cannot be made except for public purpose and on payment of compensation. The Constitution did not incorporate a theory of substantive due process, but more recently the Court has extended the test of "reasonableness" in Article 19 in an effort to introduce such a concept into India. In this part of the Chapter we will concentrate on the following problems :

i. The meaning of compensation.

ii. The concept of public purpose in a mixed economy.

iii. In which cases must compensation be paid.

iv. The development of "reasonableness" as a due process concept.

i (a) The Meaning of Compensation[2]

Even though the Constituent Assembly[3] specifically exempted provisions connected with agrarian reform from the requirement that compensation must be paid, that requirement was applicable to all other kinds of acquisition. In fact certain Ministries put forward the suggestion that the words "equitable", "fair" or "just" qualify the word compensation.[4] At the same time individuals in the Constituent Assembly

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1. The best American account of this is to be found at 26 American Jurisprudence (2d) 623-937; 27 American Jurisprudence (2d) 16-463.

2. See generally H.M.Jain (1968) 155-211; Merrillat (1970) Chapter 10; R.B.Tewari: Compensation for the acquisition of land, in S.M.Jain (ed.) Law and urbanisation in India (1969) 135-147; T.S.Rama Rao: Problems of compensation for acquisition of urban lands (ibid) 148 ff. U.Baxi: The travails of land use planning: Compensation and urbanisation (ibid) 153-172; M.Dharmadan: Eminent domain and Indian Constitution (1970) K.L.T. Jnl. 21-2.

3. The main discussion is at IX C.A.D. 1191-1300.

4. See Merrillat (1970) 58-59.

put forward the view that the amount of compensation be left to the legislature.[5] In actual fact the Constituent Assembly followed very closely the terms of Section 299 of the Government of India Act 1935 and left open the question whether "compensation" paid must be equal to a "just" equivalent of the property acquired.[6]

We have already seen how the Supreme Court was influenced by the inadequacy of compensation while considering whether a Statute was a colourable exercise of power.[7] But the Court was actually called upon to decide the meaning of the word in Article 31 (2) in Bela Banerjee v W. B.[8] In that case property was acquired in a fashionable area of Calcutta for the settlement of refugees from East Bengal and was handed over to a Co-operative Credit Society to develop. In accordance with Section 8 of the West Bengal Planning and Development Act 1948 the Society paid a compensation of Rs. 173,623 for 41 acres of land, some of which was Mrs. Banerjee's. Section 8 laid down that compensation be fixed with reference to the market value on an anterior date (in this case Dec. 31, 1946). Shastri C.J., for a unanimous Court, admitted that the Statute had laid down principles of compensation as required by Article 31 (2) and that unlike the Australian Constitution which (vide Section 51 (xxxi)) used the terms "just terms" the Indian Constitution had merely used the word "compensation". But even though he doubted the

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5. See the summary of the Constituent Assembly position in the Rajya Sabha Debates (1955) Vol. IX No. 19 col. 2450-2.

6. See Merrillat (1970) 61-63; Merrillat: A historical footnote to Bela Banerjee's case (1960) I J.I.L.I. 375; H.M.Seervai: (1967) 517-8, 523; S.L.Saksena recounting the Constituent Assembly Debates at L.S.D. (1955) Part II col.4904; G.V.Venkatasubha Rao: Vicissitudes of property as a fundamental right in Studies in law (1961 A.P.H.) 177 ff. But see the contrary view of H.M.Jain (1968) 42-9 and Chapter 8 generally.

7. See the discussion of Kameshwar v Bihar A.I.R. 1952 S.C. 252; Visheshwar Rao v M.P. (1952) S.C.R. 1020 at 1030-1; Surya Pal Singh v U.P. (1952) S.C.R. 1056 at 1070-1 supra.

8. A.I.R. 1954 S.C. 170.

relevance of the Australian case law,[9] he was obviously influenced by it, as is clear from his observation :

> "(S)uch principles must ensure that what is determined must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislature's judgement as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected is a justiciable issue to be adjudicated by this Court." 10

He thought that the fixing of an anterior date did not ascertain the "true equivalent of the land appropriated." 11

Although Shastri J. makes no reference to any case law, it is clear that both concepts ("just equivalent" and "compensation cannot be fixed with reference to an anterior date") used are in fact taken from English law affirmed there in a recent case.[12]

As a result of this case, the Fourth Amendment added to Article 31 (2) the following clause :

> " ... no such law (i.e. which fixed the compensation or lays down the principles on which it is to be determined) shall be called into question in any Court on the ground that the compensation provided by law was not adequate." 13

The Amendment was not retrospective in operation, which meant that the Court could discuss the adequacy of compensation in cases that arose from statutes before the Amendment, but not in those passed after the Amendment.

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9. Ibid at pr.7 pp.172-3. He referred in passing to the Australian case: Grace Brothers Pty. Ltd. v Comm. 72 C.L.R. 269; for the position in the Australian Constitution see Wynes: (1970) (4d) 328-334.

10. Ibid at pr.6 p.172.

11. Ibid at pr.8 p.173 (he also talked of price rises in Calcutta after the war.)

12. See Birmingham City Corpn. v West Midland etc. Ltd. (1969) 3 All.E.R. 172.

13. Inserted by Section 1 of the Fourth Amendment Act 1955.

Till 1965 the Courts accepted the restrictions that the Amendment placed upon them and in two cases made obiter observations that the Court could not enquire into the adequacy of compensation.[14] In Kunhikoman v Kerala[15] the Court dealt with a post-Amendment statute, which clearly contained inadequate provisions, but refused to challenge them because of the Amendment.[16] What is even more remarkable is the case of M. R. E. D. Ltd. v Madras[17] (a pre-Constitution case not affected by the Amendment) where the Court accepted the authority of Bela Banerjee's case, but referred to the Amendment[18] and stressed that "just equivalent" did not necessarily mean market value.[19] Further, the onus of proving that market value was not paid was placed on the petitioner.[20] It therefore appears that the Court generally took the view that its powers were limited by the Amendment in post-Amendment cases, and that Bela Banerjee's case was to be strictly applied even in pre-Amendment cases.

The only exception to this attitude was Subba Rao J.'s judgement in Deep Chand v U. P. (1959)[21] where the learned judge made an ingenious attempt to revive the Court's power to review the adequacy of compensation. Subba Rao J. put forward the argument that since the Constitution had continued to use the word "compensation" even after the

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14. Note Mudholkar J.'s observations in M/S Burrakur Coal Co. v Union A.I.R. 1961 S.C. 954 at p.963 col.2; Subba Rao J.'s observations in Paresh Chandra v Assam A.I.R. 1962 S.C. 167 at pr.7 p.170 col.1.
15. A.I.R. 1962 S.C. 723.
16. Ibid at pr.6 p.728.
17. A.I.R. 1962 S.C. 1753
18. Ibid at pr.20 p.1763
19. Ibid at pr.25 p.1763
20. Ibid at pr.26 p.1763-4.
21. A.I.R. 1959 S.C. 648.

Amendment, Parliament had accepted the Court's view that "compensation" was a just equivalent.[22] While this accords with a well known rule of construction,[23] it ignores the fact that it was common knowledge that the legislature had not accepted the Court's view of "compensation". Subba Rao J. then proceeded as if the Amendment had not even happened and observed :

> "Let us examine the question from the standpoint of a business deal ... (T)he question is whether compensation provided by Section 11 is anything like an equivalent or quid pro quo for the interest in the commercial undertaking acquired by the state." 24

Although these observations are obiter because the provisions were adequate and the case was decided on other points,[25] they are very important because the same judge used this interpretation later in 1965, after which the Court fully by-passed the restrictions placed on it by the Amendment and assumed a very wide power of review.

After 1965, the Court not only revived the use of Bela Banerjee's case with respect to pre-Amendment cases, but also used the same principles while considering post-Amendment cases. The basis on which they did so was the doctrine of colourable legislation and the argument which Subba Rao J. used in Deep Chand v U. P.[26] viz. that Parliament by reenacting the word "compensation" even after the Amendment had accepted the judicial interpretation given to that word in Bela Banerjee's case.[27] The Court argued that since Article 31 (2) provided that the legislature either fix the amount of compensation or the

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22. Ibid at pr. 39 p.670.

23. See Craies: Statutory Interpretation (6d) 167. This point is discussed infra.

24. A.I.R. 1959 S.C. 648 at pr.40 p.672 col.1.

25. In any case the point proceeded on a concession see pr.39 p.370.

26. A.I.R. 1959 S.C. 648.

27. A.I.R. 1954 S.C. 170.

principles on which such compensation is based, principles which failed to offer a "fair equivalent" were illusory and a colourable exercise of power. The Court made a distinction between the following kinds of compensation :

A. Illusory - which were a colourable exercise of power.

B. Not illusory but not a just equivalent

C. A just equivalent

D. A just equivalent but inadequate. 28

The Court's power of review extended over Categories A, B and C but not to Category D. Thus as far as the Supreme Court was concerned the Amendment merely excluded that power of review from those exceptional cases where the compensation, though a "just equivalent" was not adequate !

Once again the Court made a dubious use of Western techniques in interpreting the Constitution and Statutes. We have already shown that the doctrine of colourable legislation was never intended for universal application in this way.[29] Equally doubtful is the Court's use of the rule of construction that a statute which reenacts a word which had received judicial interpretation must be deemed to accept the meaning of the word accorded to it by the Courts. The Court merely cites the authority of a text book for this proposition.[30] But it is clear that although the rule has been generally accepted[31] it creates not more than

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28. See Palkivala's arguments in Vajravelu v Sp.Dty Collector A.I.R. 1965 S.C. 1017 at pr.13 p.1022; see also Merrillat (1970) 281.

29. See the discussion on the Supreme Court and Agrarian Reform, supra Chapter III Section 4.

30. Subba Rao J. in Vajravelu v Madras A.I.R. 1965 S.C. 1017 at p.1024 col.1 citing Craies: Statute Law (6d) 167.

31. See Jay v Johnstone (1893) 1 Q.B. 25 at 28; Barlow v Teal (1885) 15 Q.B.D. 403 at 404-5; Ex.p.Campbell (1870) L.R. 5 Ch.App.703 at 706; see also the Privy Council decision in Webb v Outrim (1907) A.C. 81 at 89.

a presumption,[32] and has not been applied on several occasions.[33] The rule was intended to be used for the interpretation of consolidating statutes,[34] and it has often been stressed that the background of the earlier cases must be looked at.[35] What the Indian Supreme Court appears to have done is to stress the technical aspects of the rule and omitted to refer to the common sense principles on which it is based. This is an example of the misuse of English principles of law to suit the Court's purposes.

What is even more significant is the manner in which the Court failed to distinguish cases arising out of statutes passed before the Amendment with those arising out of statutes passed after the Amendment.

i (b) The revival of the Court's Power of Review : 1965 - 1969.

From 1965 to 1969 the Court decided nine pre- and post-Amendment cases on compensation. The Bench construction and voting patterns in these cases are illustrated in the Table V below.

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32. Note the observations of Lord Macmillan in Barras v Aberdeen Steam Trawling and Fishing Co. (1933) A.C. 402 at 446-7.

33. e.g. Royal Crown Derby Porcelain Co. v Russel (1949) 2 K.B. 417 where the meaning attached to certain words in S.5(1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 was not accepted by a later Court.

34; See Grey v I.R.C. (1960) A.C.1; Mitchell v Simpson (1890) 25 Q.B.D. 183 at 188.

35. See Evershed M.R. in Wright v Walford (1955) 1 Q.B. 363. See also Webb v Outrim (1907) A.C. 81 at 89 where it was stressed that they must be considered decisions on the subject.

TABLE VI showing the Bench construction and voting patterns in the compensation cases 1965 - 1969.

	1	2	3	4	5	6	7	8	9
Gajendragadkar	v								
Subba Rao		*	v	*					
Wanchoo	v	v	v		v	v			
Hidayatullah		v	v				v	v	*2
Shah	*							v	*1
Dayal		v	v						
Ayyangar	v								
Sikri	v	v	v						
Bachawat					v	v	v		
Ramaswami					v			*	v
Shelat				v		x			
Mitter					*	*		v	v
Vaidialingam						v+	v		
Hegde					v		*		
Grover							v	v	v

v = participation. * or *1 = judgement of majority.

*2 = noncurring judgement. x = dissenting judgement.

+ = dissent without judgement

1 = Madras v Namasivya A.I.R. 1965 S.C. 190.
2 = Vajravelu v Madras A.I.R. 1965 S.C. 1017.
3 = Jee Jee Bhoy v Union A.I.R. 1965 S.C. 1096.
4 = Metal Corporation v Union A.I.R. 1967 S.C. 637.
5 = Union v Kamalbhai A.I.R. 1968 S.C. 377.
6 = Udai Ram v Union A.I.R. 1968 S.C. 1138.
7 = M.P. v Ranojirao Shinde A.I.R. 1968 S.C. 1053.
8 = B.Sharkar Rao v Gujerat A.I.R. 1969 S.C. 453.
9 = Gujerat v Shantilal A.I.R. 1969 S.C. 637.

Notes: to Table VI

1. Cases 1, 3 and 5 were pre-Amendment cases.

2. Case 8 has been included. It did not consider Article 31 (2) as the case was covered by Article 31A. But it suggests that if it had not Bela Banerjee A.I.R. 1954 S.C. 170 and case 2 would apply. see A.I.R. 1969 S.C. 453 at prs. 5 and 7 at pp. 456 and 459 respectively.

The revival of Bela Banerjee's case began with Madras v D. Namasivya[36] (a pre-Amendment case) where Shah J. followed the Bela Banerjee view that compensation which must be "a just monetary equivalent ... a true value"[37] cannot be fixed with reference to an anterior date. He ignored and did not cite Gajendragadkar J.'s observations in W. R. E. D. Ltd. v Madras[38] (which had taken a very restrictive view of the Court's power of review), placed the onus of establishing that compensation was not the market value on the Government and not the petitioner,[39] and did not accept information supplied by the Government that prices had in fact risen because of the Government's notification.[40] It was clear that the days of judicial retreat from Bela Banerjee's case were over.

Soon after this, Subba Rao J. began the process of establishing that the meaning of "compensation" was unchanged even after the Amendment. He got an excellent opportunity to do this in Vajravelu v Sp.Dty Collector[41] (a post-Amendment case) and Jee Jee Bhoy v Union[42] (a pre-Constitution case based on S.299 of the Government of India Act 1935 which is in pari material with Article 31 (2) as it stood before the Amendment), which were decided on the same day. He cited Bela Banerjee's

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36. A.I.R. 1965 S.C. 190 see pr.5 p.193-4 where Bela Banerjee's case is cited.
37. Ibid at pr.4 p.193 col.2.
38. A.I.R. 1962 S.C. 1753 (see pr.25 p.1763-4, pr.26 p.1764).
39. A.I.R. 1965 S.C. 190 at pr. 5 p.194.
40. Ibid at pr. 6 p.194.
41. A.I.R. 1965 S.C. 1017.
42. A.I.R. 1965 S.C. 1996.

and Vanasinghe's case in the post-Amendment case[43] and purported to show that the meaning of compensation as a just equivalent was constant whether applied to cases before the Constitution and the 1955 Amendment or after.[44] In Vajravelu v Sp.Dty Collector[45] he found the Land Acquisition Amendment Act (23 of) 1961 which assessed the value of the land on the basis of the average value over the last five years and added a solatium of 5 per cent was inadquate but not illusory and therefore vires Article 31 (2). But his lordship want one step further and found the compensation provisions ultra vires Article 14 (the equality article) because it offered less compensation than what would have been offered if the property had been acquired under the Land Acquisition Act 1894[46]. By using Article 14 instead of Article 31 (2) Subba Rao J. was able to declare the compensation provisions invalid, establish a theoretically wide power of review on the issue of the adequcy of compensation for use on future occasions, but at the same time give rise to the semblance that the Court felt itself bound by the Amendment. This is reinforced by the fact that the use of Article 14, by comparing the impugned statute with the possibility of a hypothetical exercise of power under another unrelated statute, is unprecedented and has been followed by the Court in only one other case.[47]

This is a devious use of technical rules. So devious that Hidayatullah J., who subscribed to the judgements in both these cases, looking back on the techniques used openly admitted that he had thought the judgement in Vajravelu's case in fact belonged to Jee Jee Bhoy's case.[48]

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43. Vajravelu v Sp.Dty Collector A.I.R. 1965 S.C. 1017 at pr.14 p.1023-4.
44. See Jee Jee Bhoy v Union A.I.R. 1965 S.C. 1096 at pp.1099-1100.
45. A.I.R. 1965 S.C. 1017.
46. The solatium offered under this statute is 15% and the market value fixed with reference to the market value on the date of notification.
47. See Balammal v Madras A.I.R. 1968 S.C. 1425 at pr.7 p.1428.
48. See Gujerat v Shantilal AII.R. 1969 S.C. 634 at pr.1.

A commentator on the Supreme Court was similarly confused and missed the use of Article 14 altogether.[49]

By these techniques Subba Rao J. re-established the Court's power of review. Hereafter the Court cited Bela Banerjee's case and these three 1965 cases on the meaning of the word compensation[50] together, without making any distinction between statutes enacted before and after the Amendment.[51] In Metal Corpn. v Union[52] Subba Rao J. (for Shelat J. and himself) held a statute[53] which provided that compensation paid for unused machinery would be the price on the date of acquisition, with such deductions as were made on the basis of statutes relating to Income Tax, cannot be deemed to provide relevant principles for the determination of compensation.[54] In M. P. v Ranojirao Shinde[55] the Court assumed that compensation must mean "just equivalent". In Udai

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49. See Mohd. Imam: The Indian Supreme Court and the Constitution (1968) 262.

50. See Metal Corpn. v Union A.I.R. 1967 S.C. 637 which at pp.641-3 cites Bela Banerjee's case; Ramasivya v Madras AIR 1965 S.C. 190; Jee Jee Bhoy v Union A.I.R. 1965 S.C. 1096; Vajravelu v Sp.Dty Collector A.I.R. 1965 S.C. 1017; Union v Kamalbhai A.I.R. 1968 S.C. 377 (which also cites all these cases); B.Shankara Rao v Gujerat A.I.R. 1969 S.C. 453 at pr.7 p.458.

51. The following are post-Amendment cases: Metal Corpn v Union A.I.R. 1967 S.C. 637; Udai Ram v Union A.I.R. 1968 S.C. 1138; M.P. v Ranojirao A.I.R. 1968 S.C. 1053. The following is a pre-Amendment case: Gujerat v Kamalbhai A.I.R. 1968 S.C. 337.

52. A.I.R. 1967 S.C. 634.

53. The Metal Corporation of India (Acquisition and Undertaking Act (44 of) 1965.

54. A.I.R. 1967 S.C. 637 at pr.7 p.641 col.2.

55. A.I.R. 1968 S.C. 1053 at pr. 7 p.1057 Hegde J. observes:"Further, the compensation referred to in Article 31(2), as held by this Court in various decisions is the just equivalent of the value of the property taken. If for every rupee acquired 50 paisas or less is made payable as compensation, the violation of Article 31(2) would be patent and in those circumstances the exercise of the powers of the legislature would be considered as a fraud on the exercise of its powers and consequently ... a colourable piece of legislation." But note this was an alternative argument. The main argument was that choses of action cannot be acquired.

Ram Sharma v Union[56] the Court divided on the issue of compensation, and the minority (Shelat J. for Vaidialingam J. and himself) were prepared to invalidate a statute which froze the value of property acquired with reference to the date of notification, for two years.[57] But both the majority and the minority accepted the authority of the 1965 cases on the meaning of the word compensation,[58] even though the majority refused to accept an argument based on Article 14 of the sort used in Vajravelu's case.[59]

The acceptance of a uniform meaning for the word "compensation" means that the Court had in varying degrees accepted the approach inaugurated by Subba Rao J. in Vajravelu's case. The degrees to which they agreed to this process are shown in the Table below.

TABLE VII showing varying degrees of acquiescence to the view that compensation was a just equivalent.

	P1	P2	P3	P4	P5	P6
Gajendragadkar	v1		v			?(4)
Subba Rao	v	v		v		v
Wanchoo	v	v		?	v	v
Hidayatullah	v	v			v	v
Shah	v		v	?(2)		?(5)
Dayal	v	v			v	v
Ayyangar	v		v			v
Sikri	v	v			v	v
Bachawat	v	v			v	v
Ramaswami	v		v			v
Shelat	v	v		v(3)	v	v
Mitter	v	v		v	v	v
Vaidialingam	v	v			v	v
Hegde	v	v		v	v	v
Grover	v	v			v	v

56. A.I.R. 1968 S.C. 1138.

57. Ibid at prs. 58-61. For the background to this controversy see Merrillat (1970) 273-4.

58. Ibid at prs. 32-34 (the majority); prs. 58-61 (the minority).

59. Ibid at prs. 35-7 p.1155-6.

Key to Table VII

P1 - P6 indicates predictable patterns.

P1 includes those judges who subscribed to Bela Banerjee's case in cases involving pre-Amendment statutes.

P2 includes those who agreed that compensation is equal to a "just equivalent" and applied that meaning to both post and pre-Amendment statutes.

P3 includes those judges who were agreed that compensation is a just equivalent but were party to cases which involved only pre-Amendment statutes.

P4 those that make no distinction between pre-and post-Amendment cases and delivered judgements to that effect.

P5 The same as P4 but including those judges who had merely concurred in the judgements, not written any themselves.

P6 those who could be predicted to decide post-Amendment situations by enquiring whether a just equivalent was paid or not ,

(v = yes; ? = insufficient information).

Notes:

1. It should be noted that Gajendragadkar J. did modify the accent of Bela Banerjee's case in M/S M.R.E.D. v Union A.I.R. 1962 S.C. 1763.

2. Shah J.'s judgement in Madras v Namasivya A.I.R. 1965 S.C. 190 did not deal with a post-Amendment situation. It was the first in the 1965 series.

3. Shelat J. delivered a vigorous dissent in Udai Ram v Union A.I.R. 1963 S.C. 1138 supporting the 1965 cases.

4. Gajendragadkar J. at no stage dealt with a post-Amendment situation.

5. Shah J. participated in only pre-Amendment cases, and in B. Shankara Rao (case 8 on Table VI, on which see Note (2) to Table VII in which the comments made are clearly obiter.

We shall see that all the judges (with the possible exceptions of Gajendragadkar and Shah JJ.) had either delivered or concurred in judgements which accepted the new developments. But in Gujerat v Shantilal[60] a Court consisting of Hidayatullah C.J., Shah - who wrote the judgement - Ramaswami, Mitter and Grover JJ, overruled Metal Corpn. v Union[61] clearly distinguished between pre-Amendment and post-Amendment case law,[62] severely limited some of the observations in Vajravelu's case,[63] disapproved of the approach in Bela Banerjee's case[63] and abandoned the view taken in Bela Banerjee's case that compensation cannot be fixed with reference to an anterior date.[65] The Court did not overrule Vajravelu's case, but merely took the view that the meaning of the word "illusory" was not to be found with reference to concepts in pre-Amendment cases like Bela Banerjee's case, because the Court was precluded from considering the adequacy of compensation by the Fourth Amendment.

Hidayatullah C.J. clearly admitted that he had made a mistake.[66] But the attitude of the other judges is a little difficult to understand. Shah J. had in fact approved of Bela Banerjee's case in his judgement in D. Namasivya v Madras[67] and all the other judges had accepted in varying degrees the fusing together of pre-Amendment and post-Amendment case law. Ramaswami J. had written a judgement where he accepted by way of [illegible] and had made an attempt to [illegible]

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60. A.I.R. 1969 S.C. 634.

61. A.I.R. 1967 S.C. 637 overruled in A.I.R. 1969 S.C. 634 at [illegible]

62. A.I.R. 1969 S.C. 634 at pr.43 p.649.

63. Ibid at pr.47 p.657.

64. Ibid at pr.36 p.648.

65. Ibid at pr.36 p.648

66. Ibid at pr.1 p.637-8.

67. A.I.R. 1965 S.C. 1096 at pr.8 p.1099-1100.

of an obiter dictum this fusion of case law[68]. Grover J. had subscribed to this obiter dictum and later also assented to Hegde J.'s judgement in M. P.v Ranojirao Shinde[69] which had accepted that "compensation" meant a "just equivalent"; Mitter J. wrote the majority judgement in Udai Ram v Union[70] where he accepted the new interpretation even though he did not apply it to invalidate the statute before him. Is is not inconceivable that these judges had merely subscribed to Subba Roa J.'s interpretation but were looking for an opportunity to overrule it ? We can suspect once again that the judges relied on discussions outside the Court (as demonstrated by their inconsistent voting) rather than upon open discussion by the use of dissenting judgements.

One would have thought that Shantilal's case would have been the last word on the subject, but in Lachmandass v Jalalabad Municipality[71] Sikri J. (for Hidayatullah C.J. and Bachawat, Mitter and Hegde JJ.) once again began to talk in terms of the importance of compensation as "the full value of the property ... (and) the point of time at which the value was to be ascertained".[72] They held that the impugned statute which left these questions in the hands of the executive was ultra vires Article 31 (2) as it stood before the Amendment. At least one foreign observer was surprised to discover that this decision had been made after the Shantilal case.[73] The retreat from Shantilal had already begun and culminated in R. C. Cooper v Union[74] (the famous Bank

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68. See B. Shankara Rao v Mysore A.I.R. 1969 S.C. 453 at pr.5 p.456-8; pr.7 p.459.
69. A.I.R. 1968 S.C. 1053.
70. A.I.R. 1968 S.C. 1138.
71. A.I.R. 1969 S.C. 1126.
72. Ibid at pr.10 p.1129.
73. J.M.Finnis (1970) A.S.C.L. 37.
74. A.I.R. 1970 S.C. 564.

Nationalisation case) which was decided only a few months after the Shantilal decision.

In R. C. Cooper's case, the court revived the concept of "illusory" used in Vajravelu's case and suggested that that case and Shantilal's case merely represented two converging lines of thought. Shah J. (who was the author of the Shantilal ruling) observed :

> "Both lines of thought which converge in the ultimate result, support the view that the principle (of compensation) specified by the law is beyond the pale of challenge if it is relevant ... and is recognised principle for the determination of compensation and the principle is appropriate in determining the value of the class of the property sought to be acquired." 75

All that the Court had done was to substitute the concept of "recognised principle" for the concept of "just equivalent". The former is in fact wider than the latter because it ushers in ~~the~~ universal ideas as can be seen from the specimen catalogue of what it considered to be recognised principles, which included :

> "Market value, capitalisation of net annual profit of houses, the bona fide cost of reinstatement elsewhere, the cost of demolition, estimation of all the property taken as a unit. " 76

Applying these principles to the instant case the Court by a 10 : 1 majority held that the Banking Companies Act (8 of) 1969 violated these principles because it had not valued all the Bank's assets separately,[77] not paid for the goodwill of the banking Companies[78] nor compensated the banks for the unexpired portion of the leases.[79]

Instead of following Ray J.'s dissenting view that "illusory"

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75. Ibid at pr.100 p.608-9. (emphasis mine)

76. Ibid at pr.103 p.609-610.

77. Ibid at pr.104 p.610.

78. Ibid at pr.107-9 p.611.

79. Ibid at pr.110 p.611.

meant "shockingly illusory",[80] the Court had even gone further than Bela Banerjee's case. Their view that the power to fix compensation cannot be wholly delegated to the legislature contrasts with the attitude taken by the House of Lords in a case from Ulster.[81]

After R. C. Cooper's case the Court began to use the words "inadequate", "illusory" and "market value" in all kinds of cases interchangeably. Thus in Bachan Singh v Punjab[82] (a pre-Amendment case) the Court observed :

> "In our view, the compensation payable is neither inadequate nor illusory, but on the other hand is not less than the market value and may even be more."

The Bank Nationalisation judgement may well have resulted from the new additions to the Bench that decided the case. Sikri J. had been a party to the 1965 cases, Shelat J. had actually subscribed to the judgement in Metal Corpn. v Union[83] which was overruled in Shantilal's case and written the minority judgement in Udai Ram v Union[84], Hegde J. had accepted the "just equivalent" approach in H. P. v Ranojirao Shinde[85] and Ray, Reddy and Dua JJ. were new to the problem. Only Shah and Grover JJ. had been party to Shantilal's case. Once again we are faced with an inconsistent voting pattern without any explanations from the judges themselves.

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80. Ibid at pr.204 p.638. Note his view at pr.220 p.641 that the compensation given by the impugned statute, though not an equivalent, was nevertheless not illusory. For an example of "shockingly illusory" see Mangalji v Rajasthan A.I.R. 1971 Raj. 167 at pr.10 p.170-1.

81. See the decision of the House of Lords in O.D.Cars case (1960) 2 W.L.R. 148 on the Northern Irish Constitution,1920 (Sect.5(1)) that it was intra vires to permit compensation to be decided on the basis of a Ministry decision.

82. A.I.R. 1971 S.C. 2164 at pr.13 p.2127.

83. A.I.R. 1967 S.C. 637.

84. A.I.R. 1968 S.C. 1138.

85. A.I.R. 1968 S.C. 1053.

The implied use of foreign doctrine.

Despite this inconsistency, the Court had at last established on a sound basis a pattern or review based on the recognised principles of cosmopolitan jurisprudence. Even though the Court does not mention any foreign case law, it is clear that the Court was inspired by foreign concepts rather than the text of the Constitution. The emphasis on "full compensation" is an important feature of Anglo-American case law and was incorporated in the Indian Land Acquisition Act as early as 1894. The desirability of taking into account the potential value of the land can also be traced to a Privy Council decision[86] which was cited in Vajravelu's[87] and Shantilal's[88] cases. The Supreme Court obviously did not want to abandon the principles laid down in the Land Acquisition Act and in various other cases took particular care to ensure that they were preserved.[89] It is against the pattern of that Act, rather than the Constitution, that the Supreme Court has deliberated on the meaning of the word "compensation".

The result that the Supreme Court has achieved accords with the position in England,[90]

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86. Vyricherla Narayana v Revenue Div.Officer A.I.R. 1939 P.C.98. See also State v Desai A.I.R. 1969 Guj. 276 at pr.7 p.280-1.

87. A.I.R. 1965 S.C. 1017 at pr.17 p.1026.

88. A.I.R. 1969 S.C. 634 at pr.36 p.648.

89. See M.P. v Vishnu Prashad A.I.R. 1966 S.C. 1593 (and comments of Merrillat (1970) 226-229; Udai Ram v Union A.I.R. 1968 S.C. 1138; Balammal v Madras A.I.R. 1968 S.C. 1425 at pr.7 p.1428-9; pr.12 p.1429; A.I.T.and T.C. v Collector A.I.R. 1971 S.C. 1253 at pr.3 p.1253; Daisy v Kerala A.I.R. 1971 S.C. 2272. See also the following High Court decisions: Doongarsee & Sons v State A.I.R. 1971 Guj. 46 at pr.9 p.54; State v Mohd.Mustafa A.I.R. 1971 Mad. 213 (on the "solatium") pr.3 p.214-5; Rohtas Industries Ltd. v Union A.I.R. 1971 Pat.414 at 424-5 (on compensation generally).

90. See Birmingham City Corpn v West Midland Baptist (Trust) Association (Inc.) (1969) 3 W.L.R. 977 and comments thereon Brownlie (1970) A.S.C.L. 160; Mann (1969) 85 L.Q.R. 516.

the United States,[91] Australia,[92] Malaysia,[93] but the question whether it deals with the problems of underdevelopment is left at best on the surface open. Unable to tackle the moral and economic problems, the Court drives the legislature into saying explicitly what the Court seems to wish to avoid admitting openly. Inadequate compensation is becoming a normal feature of African public law.[94] In direct contrast to the Bank Nationalisation case we find a Zambian statute which specifically lays down that no compensation shall be paid for the goodwill of a Company.[95] Spurred on by Anglo-American ideas of fairness the Court has tried to keep abreast of western ideas, but failed to apply a theory of "distributive justice"[96] in India's context.

The Court's desire to keep within western patterns might have been justified if it were warranted by the text of the Constitution. But what the Court seems to have done is misused techniques of interpretation and indulged in inconsistent voting patterns to achieve a power of review which was clearly denied to it by the terms of the Fourth Amendment.

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91. See the recent case of U.S. v W.G.Reynolds A.I.R. 1971 U.S.S.C. 21; Cors v U.S. 75 Fed.Supp.235 and comment 61 Har.L.R. 880-2; McCormick: The measure of compensation in Eminent Domain (1933) 17 Minn.L.Rev. 461; Michelmann: Property, utility and fairness: Comments on the ethical foundations of "just compensation" law. (1967) 80 Har.L.Rev. 1165 (where the whole issue is discussed from a wider point of view).

92. See Wynes (1970 4d.) 328-334.

93. See Alagappa Chettiar v Collector (1968) 1 Mal.L.Jnl. 243 (F.C.).

94. See Tanzania G.N.No. 90 and 166 of 1968 which make no mention of compensation; Tanzania Land Acquisition Act (47 of) 1967 which gives a restricted compensation but allows recourse to Courts to settle disputes.

95. See D.C.M.Yardley (1968) A.S.C.L. 149 where the Tanzanian statues are also mentioned.

96. For a discussion of this see Michelmann (1967) cited f.n. 91 supra and U. Baxi: State of Gujerat v Shantilal : A requiem for just compensation (1969) 9 Jai.L.Jnl. 29.
Baxi deals with too many western concepts to put forward a plea of egalitarianism without really discussing India's needs.

ii The concept of public purpose in a mixed economy.[97]

a. The concept of public purpose generally.

In Hamabhai Framjee Petit v Secy. of State[98] the Privy Council approved of the wide definition given to "public purpose" by Batchelor J. The latter defined it as

> "an object or aim in which the general interest of the community as opposed to the particular interest of individuals is directly and vitally concerned."

This has been cited with approval by the Supreme Court.[99] Following this line of reasoning, Courts in India have taken a very wide view of public purpose. Thus in Kameshwar v Bihar[100] although they found the statute a colourable exercise of power, they did not invalidate it as lacking in public purpose. The following have been approved as falling within the meaning of public purpose: agrarian reform,[101] slum clearance to house the homeless,[102] procuring a house for a diplomat[103] or an office for a State trading Corporation,[104] acquisition of land to construct a dharamshala,[105] house members of a co-operative society,[106] for industrial

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97. See generally J.Narain: The concept of public purpose in Article 31 (2) of the Constitution of India (1964) 6 J.I.L.I. 175-84; H.M.Jain (1968) 136-154; V.N.Shukla: Concept of Public Purpose and Land Reuse Planning in S.N.Jain (ed)) Law and urbanisation in India (1969) 93-102; P.R. Ramachandra Rao: Public purpose and compulsory acquisition of property, in (G.S.Sharma (ed)) Property relations in Independent India (1968) 107-114.

98. (1914) 42 I.A. 44.

99. Kameshwar v Bihar A.I.R. 1952 S.C. 252; Bombay v Nanji A.I.R. 1956 S.C. 294; Somawanti v Punjab A.I.R. 1963 S.C. 151 at pr.30 p.162.

100. A.I.R. 1952 S.C. 252 at 274.

101. Kameshwar v Bihar A.I.R. 1952 S.C. 252; Surya Pal Singh v U.P.(1952) S.C.R. 1056.

102. Bhanji Munji v Bombay A.I.R. 1955 S.C. 41 at pr.18.

103. Bombay v Ali Gulshan A.I.R. 1955 S.C. 810.

104. Bombay v. Nanji A.I.R. 1956 S.C. 294.

105. Thambiran v Madras (1952) Mad. 892.

106. Bhagwat Dayal v Union A.I.R. 1959 Pun. 479.

development,[107] planned development,[108] housing schemes,[109] houses for workmen,[110] or for a Mahatma Gandhi Memorial.[111]

The Court has also not usually declared statutes ultra vires for want of public purpose[112] and has followed strictly the text of Section 6 (3) of the Land Acquisition Act 1894 which lays down that a declaration by the Government that land is wanted for a public purpose shall be conclusive evidence that the land is wanted for such a purpose,[113] unless there is a colourable exercise of power.[114] More recently the Punjab High Court has held that an acquisition for one public purpose may, in the absence of mala fides, be transferred for use for another public purpose.[115] But that decision is difficult to reconcile with another decision of the same Court.[116]

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107. A Rodericks v Maharashtra A.I.R. 1967 S.C. 1788.

108. Jage Ram v Haryana A.I.R. 1971 S.C. 1033.

109. Ratilal v Gujerat A.I.R. 1970 S.C. 984.

110. See Land Acquisition Act 1894 Sec.40(1)(a) and cases in it discussed infra.

111. K.M.Chinai v Gujerat A.I.R. 1970 S.C. 1188 at pr.12 p.1192.

112. e.g. Bombay Land Requisition Act (23 of) 1948 in Bhanji Munji v Bombay A.I.R. 1955 S.C. 41; see also Bombay v Ali Gulshan A.I.R. 1955 S.C. 810; Lilavati v Bombay A.I.R. 1957 S.C. 521; Collector, Akola v Ramchandra A.I.R. 1963 S.C. 244.

113. Jhandu Lal v Gujerat A.I.R. 1961 S.C. 984; Somawanti v Punjab A.I.R. 1963 S.C. 151; both of which are cited and followed in Ratilal v Gujerat A.I.R. 1970 S.C. 984; Anand Brahma v U.P. A.I.R. 1967 S.C. 1091 (which with the first case cited in this footnote is cited in Jage Ram v Haryana A.I.R. 1971 S.C. 1033.

114. Mudholkar J. in Somawanti v Punjab A.I.R. 1963 S.C. 151 at pr.40 p.165-6. In this the Court approved of the Government's policy of acquiring land for companies after paying a nominal amount of Rs.100. But this policy was approved by Courts even before Independence. But see Ponnaxia v Secy. of State A.I.R. 1926 Mad. 1099 (where the Government's contribution was 1/90,000 of the total compensation) which did not approve of this policy.

115. Suresh Varma v State A.I.R. 1971 P & H 466. But note that the Government had spent a lot of money on the original purpose.

116. Y.B.School v Punjab A.I.R. 1971 P & H 337 at pr.5 p.339-40 relying on a dubious and admittedly irrelevant decision of the Supreme Court.

Courts in India have taken the view that the Government has more information about public needs and must be left with a discretion to deal with problems which it faces.[117]

But there are certain disturbing decisions which suggest that the Supreme Court may tend to fuse the wide concept of public purpose with dis-related legal principles, which though important to the lawyer are not in themselves the proper criteria for determining public purpose. Thus in Lachmandas v Jalalabad Municipality[118] Sikri J. held that though providing housing for the homeless was a public purpose the impugned statute[119] was lacking in a public purpose because it neither provided for alternative accommodation nor adequate compensation.[120] In Khub Chand v Rajasthan[121] the Court laid down the rule that statutes which acquire property must be construed strictly and stressed in the instant case that insufficient public notice had been given. In Raja Anand v U.P.[122] the Court admitted the lack of jurisdiction to enquire into public purpose but nevertheless indirectly reviewed the acquisition on the basis that the Government had made an error relating to jurisdictional fact because the Court thought it had not applied its mind to the question before it. There are also various cases where the Court, abandoning its usual policy of condoning technical defects,[123] has invalidated a notification

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117. See Bose J.'s observations in Bhanji Munji v Bombay A.I.R. 1955 S.C. 41 at pr.8.

118. A.I.R. 1969 S.C. 1126.

119. Section 20B. Displaced Persons (Compensation and Rehabilitation) Act 1954.

120. A.I.R. 1969 S.C. 1126 at p.12 p.1129.

121 A.I.R. 1966 S.C. 1074 at 1077.

122. A.I.R. 1967 S.C. 1081. Here a use is made of English administrative law techniques to enquire into the Government's satisfaction.

123. See Babu Barkya v Bombay A.I.R. 1960 S.C. 1203 at 1208 (which Subba Rao J. had some difficulty in distinguishing in Khub Chand v Rajasthan A.I.R. 1966 S.C. 1074). For a recent illustration see K.M.Chinai v Gujerat A.I.R. 1970 S.C. 1188 at pr.12 p.1192.

because it contained a technical defect.[124]

More recently in R. C. Cooper v Union[125] the Supreme Court held that Article 31 (2) is linked to Article 19 (5) of the Constitution. This means that a "public purpose" must now also be in the interest of the general public. Does this mean that it must be based on established "recognised principles" of law and that legal criteria, like the adequacy of compensation, will also be considered while ascertaining the extent to which the statute subserves a public purpose ? The decisions discussed above suggest that the Court is not averse to the idea of determining the public content of an enactment not according to the secular criteria of public need, but on the basis that it may not be a public purpose if it offends accepted legal principles.

Further, there is a real inconsistency in subscribing to a wide view of public purpose and at the same time adopting the rule that the statute which acquires property must be strictly construed.

b. The concept of public use in a mixed economy.

Keeping this in mind we turn to the Court's interpretation of the concept of "public use" in Section 40 (b) of the Land Acquisition Act 1894 which permits acquisitions by the Government for the benefit of a company (with the company paying the compensation) where

> "(b) ... such acquisition is for the construction of some work and that such work is likely to prove useful to the public."

In such cases, the company enters into an agreement (with the Government) which details under Section 41 (5) of the same statute

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124. See Shyam Behari v M.P. A.I.R. 1965 S.C. 646, where the Court invalidated the notification because it did not say that it was for a company although it did state that it was for the Premier Refrigerating Factory (see pr.12).

125. A.I.R. 1970 S.C. 564 at pr.43-62. But see the dissenting view of Ray J. at pr.156.

> "... the time within which and the conditions on which the work shall be executed or maintained and the terms on which the public shall be entitled to use the work."

The problem is : should the phrase "useful to the public" be limited to constructions which are actually used by the public or can it include a wider spectrum of activities which though not used directly by the public can be said to subserve a public need ? The former view would limit acquisitions for constructions like parks, dharamshalas, baths, crematoria, and so on. The latter view would enable the Government to make an alliance with private enterprise and buy up land for them for industrial development in depressed areas where there is unemployment or insufficient capital investment. This latter view would enable the Government to use the statute for regional planning and achieving its declared economic objectives.[126]

Some attempt has been made in America to accept the latter view.[127]

In A. L. Arora v U.P. (no. 1)[128] the Government acquired land for the establishment of a textile mill. It was contended that the establishment of such a mill was in itself likely to prove useful to the public. But Wanchoo J., for the majority, held it was not. He refused to believe that

> "it was the intention of the legislature that the government should be a general agent for companies to acquire lands for them in order that the owners of companies may be able to carry on their activities for private profit ... simply because the company might produce goods which would be useful to the public." 129.

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126. For a general review of planning priorities see Streeton and Lipton (ed) The Crisis of Indian Planning (1963) Chapters 2,3,5.

127. See on "public use" 16A Corpus Juris Secundum 940-2; "public utility" 73 Corpus Juris Secundum 991 ff. See also on "public use" 26 American Jurisprudence (2d) 666-733 but particularly 671-674 (urban redevelopment through private interests (p.695-6); the fuel industries (pp.711-22).

128. A.I.R. 1962 S.C.764 .

129. Ibid at pr.13 p.770 col.1.

Relying on the "agreement" clause in Article 41 (5) that the public should be entitled to use the work, he rejected American precedent on the interpretation of "public use" in the Fifth Amendment, on the grounds that that Amendment was not in pari materia to the statute before it.[130] This approach is technically right but it is clear that Wanchoo J. evaded the responsibility of discussing "public use" in the context of a mixed economy, which the American decisions did.[131]

In complete contrast Sarkar J. (the dissenting judge) took the view that this approach was too narrow and cited Indian case law to suggest that public use had been regarded even in India as something more than constructing items for general use by the public.[132] He was even willing to dispense with the provisions of Section 41 (5) in cases of public utility like the construction of a "drug factory",[133] a "hospital"[134] or to house the workmen of a company.[135]

Parliament supported the dissenting view and after a lively debate[136] in which the Socialists criticised the Court for not allowing the Government to acquire land for the benefit of private enterprise (!) added Section 40 (aa) to the Act. This clause permitted acquisitions

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130. Ibid at pr.16 p.772.

131; His Lordship referred to 18 American Jurispurdence 661-2 without citing any case law. See however Berman v Parker 348 U.S. 26. See also the references cited f.n.127 supra).

132. Ibid at pr.32 p.777 where he cites Ezra v Secy. of State (1905) 32 I.A. 93 (acquisition for the Bank of Bengal to house a public debt office for the Government); Radha Raman v U.P. A.I.R. 1954 All.70 at pr.13 p.703 (land for a co-operative housing society); Ranibala v W.B. (1958) 62 C.W.N. 73 (extension of a textile mill).

133. Ibid at pr.35 p.778.

134. Ibid at pr.37 p.779.

135. Ibid at pr.38 p.779.

136. See L.S.D. 21, 29, 30 Aug. 1962. The debate is briefly recounted by H.M.Jain (1963) 145-6.

> "(aa) ... for the construction of some building or work for a company which is engaged or taking steps for engaging itself in any industry or work which is for a public purpose."

The corresponding agreement clause was to contain details of

> "the time within which and the conditions on which the building or work shall be constructed or executed."

Section 7 of the Amendment Act made these provisions retrospective.

These provisions came to be considered in R. L. Arora v U.P. (No. 2)[137] where Wanchoo J. for the majority upheld the validity of the Act and in contrast to his earlier attitude took the view that the statute must not be interpreted in a literal and mechanical way.[138] But he went on to take a restrictive view of Section 40 (aa) and observed that it

> "does permit acquisition of land of some building or work, which is for a public purpose unless the building or work for which the land is acquired also subserves the public purpose of the industry."[139]

This point is further developed by Ayyangar J. in his dissenting judgement. He admitted that industrial development may be a public purpose but that the statute was invalid because the statute gave "carte blanche to the Government"[140] which could acquire land for a company to build a private house or a swimming pool for the Directors.[141] Once again the Court was trying to use the Common Law techniques of distrusting delegation of power and fusing it with the meaning of public purpose.[142] In any

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137. A.I.R. 1964 S.C. 1230;

138. Ibid at pr.1238 col.1. He also quoted from Kedar Nath v Bihar A.I.R. 1962 S.C. 955 to invoke the Constitutional rule of construction that the Court must lean in favour of the constitutionality of an enactment.

139. Ibid at p.1238.

140. Ibid at pr.30 p.1245.

141. Ibid at p.1241-2.

142. Setalvad: The Indian Constitution 1950-65 (1967) 142-3 makes the same mistake. His comment begins "Further, apart from trusting the executive ... "

event to say that the construction of a house on a vast industrial estate was for private purposes is to ignore the nature of such estates and the terms on which private corporations agree to develop certain areas.

In W. B. v Taluqdar[143] following R. L. Arora v U. P. (No. 1)[144] Wanchoo J. held that an acquisition for accommodation for the staff of the Ram Krishna Mission was not a public use within the meaning of Section 40 (b).[145] He further suggested that Section 40 (aa) did not apply either.[146] Sarkar J. subscribed to the judgement in this case, even though he had specifically approved of acquisitions for such purposes in an obiter dictum in his dissent in R. L. Arora v U. P. (No.1).[147] Again, in R. K. Agarwala v W. B.[148] Shah J. for a unanimous Court held that acquisition of land for the Bharat Sevashram Sangrah to maintain students, a publication department and guest houses, did not fall within the meaning of Section 40 (b) and would have been invalid but for the fact that Section 40 (aa) had been passed with retrospective effect. Thus land could not before the Amendment even be acquired for public charities, unless it was for actual use by the public.

However distasteful the idea of the Government using private companies for development and planning purposes may be, it is clear from the Government's Industrial Resolutions of 1948 and 1956[149] that

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143. A.I.R. 1967 S.C. 746.

144. A.I.R. 1962 S.C. 764 at pr.15.

145. A.I.R. 1965 S.C. 746 at pr.13-4.

146. Ibid at p.653 col.1 because the nature of the work of the servants of the Mission was not explained.

147. A.I.R. 1962 S.C. 764 at pr.38 p.778.

148. A.I.R. 1965 S.C. 795 at pr.9.

149. See Myrdal: II Asian Drama 816-23.

this is a part of Government policy. An eminent economist has suggested that the Government have been motivated by practical considerations rather than ideology.[150] It is clear that private enterprise is an important part of the Government's policy of industrial development, which the Court agrees is a public purpose.[151] The importance of their involvement can be seen from the Table below.

TABLE VIII showing the relative share of public and private enterprise in the national product 1950-1962 (when the cases were decided).

Net output	1950	1955-6	1960-1	1961-2
Public	290	420	570	610
Private	8,830	8,990	12,730	13,060

(in crores of rupees)

Source: H. M. Jain: Right to property (1968) 279.

This may well amount to what a foreign observer has called "post office socialism"[152] but that is no concern of the Court's which must seek to define public purpose according to what are (at least theoretically speaking) the wishes of the Indian people expressed through Parliament. In any case, the Government's use of private enterprise to ease unemployment and further development is becoming a normal feature of the modern State.

Apart from Sarkar J. the Court seems not to have even discussed the concept of public purpose within the meaning of the needs of a mixed economy even though it has made public its view that it could not have been the intention of Parliament to sanction the acquisition of lands for

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150. See Gunnar Mydral: III Asian Drama 816-832.

151. Ibid 823-826 particularly 826.

152. Ibid quoting Ambassador J. K. Galbraith.

purposes of private profit. The Court, despite its formal protest that it has not, has followed a strict and only technically proper line of construction, has assumed an attitude (on a vital question) which does not reflect well on the capacity of the Court to adjust the meaning of public purpose to the Indian needs or to be able to interpret the terms of an 1894 statute so that it can still be used to suit the country's changing needs.

iii. In which cases must compensation be paid ?

One of the most important questions of constitutional law centred around the question of when compensation must be paid. Apart from the technicalities involved in constructing the text of the Constitution, it must be made clear from the beginning that the problem is a practical one involving a policy decision by the Court. This is accepted even in a rich country like America.[153] Nor can the State be expected to pay for destruction prompted for reasons of public health (popularly called an exercise of"police power"), though years ago a young student at Harvard rightly observed :

> "The distinction that the Courts have established between destruction and appropriation is I believe without exception but it does not seem to be founded on any principle of sound justice." 154

Ultimately the Courts must make a policy decision that certain rights are worth compensating. Thus in America the Government has been asked

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153. See 16A Corpus Juris Secundum 712-720 and see Berman v Parker 348 U.S. 26; Nabee v White Plains Publishing Co. 327 U.S. 178; Bowles v Willingham 321 U.S. 503 (no compensation for diminution in value - but now see Griggs v Alleghany County (1962) 369 U.S. 84); Puget Sound Power and Light Co. v City of Seattle 291 U.S. 619 (incidental damage). But compensation can be deemed payable for unreasonable restriction on the enjoyment of property, see Block v Hirsh 256 U.S. 135.

154. E.Abbot: The police power and the right to compensation 3 Har.L.Rev. 189 at 204-5.

to pay compensation for interference due to airplanes making a noise[155] or because of the inconvenience caused by the drainage of a dam.[156]

The Supreme Court of India had three options. Firstly, the Court could follow the common sense approach of the Federal Court of India in Jaganath Baksh v United Provinces[157] where it was held that a statute safeguarding the rights of tenants was not an acquisition which was to be compensated for. The Supreme Court did not even mention this case in Subodh Gopal v W. B.[158] - one of the controversial cases which led to the Fourth Amendment[159] - even though it was directly in point.[160] In later cases,[161] the Supreme Court approved of the Federal Court, but its relevance appears to have been limited to tenancy matters.

Secondly, the Court could have followed the view of the Australian High Court in Minister v Dalziel[162] where the test laid down was whether expropriation was liable to compensation if a statute

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155. See U.S. v Causby (1946) 328 U.S. 256 and see the comment at (1960) 74 Har.L.R. 1581 at 1584.

156. See Kansas City Life Insurance Co. v U.S. (1947) 74 Fed.Supp. 653 (a 4:1 decision) and the comment on it at (1948) 61 Har.L.R. 832-4.

157. (1943) F.C.R. 72 affirmed by the Privy Council (1946) 73 I.A. 123. For a discussion of this in the constitutional context see Seervai (1967) 513 ff.

158. A.I.R. 1954 S.C. 92.

159. See the Statement of Objects and Reasons to the Fourth Amendment Act 1955. Gazette Ext. Pt. 1 Sec.1 p.745.

160. Both concerned the question as to whether the control of a landlord's rights in relation to his tenants could be controlled without paying him any compensation.

161. See Umeg Singh v Bombay A.I.R. 1955 S.C. 540; Kishan Chand v Rajasthan A.I.R. 1955 S.C. 795; Guru Datt Sharma v Bihar A.I.R. 1960 S.C. 1684 at pr.28,30 p.1697. For another tenancy case where the common sense approach was followed see D.K.Mabhirajah v Mysore A.I.R. 1952 S.C. 339 at pr.18 p.342.

162. (1943-4) 68 C.L.R. 261.

"seize something short of the whole bundle (of the rights that constitute property) owned by the person it was expropriating." 163

In Chiranjit Lal v Union[164] all the judges of the Court adopted this approach and stressed that the Court would not take the formal view that for Article 31 (2) to apply interference with title was necessary. There was however a difference of emphasis on the application of the Australian cases.[165] This Australian case was also approved in Subodh Gopal v W. B.[166] and Dwarkadas v Sholapur Spg. & Wvg. Co. Ltd.[167] It must however be noted that the Australian provisions are not in pari materia. The majority view in the Australian case was not followed by the Bombay High Court.[168] But though the Australian case is not irrelevant because it does away with the need to follow a formal approach, it does nevertheless take a wider view than the text of the Indian Constitution, and Indian conditions, admit.

Lastly there was the text of the Constitution. Article 31 (1) of the Constitution lays down :

"No person shall be deprived of his property, save by authority of law." (emphasis mine)

But Article 31 (2) lays down that compensation shall only be paid if the property "was taken possession of, or acquired for public purposes.".

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163. This passage is cited in Chiranjit Lal v Union A.I.R. 1951 S.C. 41 at p.56 col.1.

164. A.I.R. 1951 S.C. 41 at p.56 col.1 (per Mukerjea J.) at p.61 col.2 (per Das J.).

165. Das J. took a slightly narrower and more well defined view of what would constitute an appropriation.(Recounting his emphasis in Dwarkadas's case A.I.R. 1954 S.C. 119 at pr.51 p.136 he observed:"My observations were much more definite than those of Mukerjea J.")

166. A.I.R. 1954 S.C. 92.

167. A.I.R. 1954 S.C. 119.

168. Bhagwati J. in Tan Bing Tain v Collector A.I.R. 1946 Bom.216. This case is mentioned in passing in Dwarkadas's case A.I.R. 1954 S.C.119 p.129 col.2 (per Mahajan J.).

The Court could either have emphasised the concept of "deprivation" in Article 31 (1) and stressed that Article 31 (1) and (2) were inter-related, alternatively it could have emphasised "taken possession of or acquired" in Article 31 (2) on the grounds that that Article was an independent provision and stood on its own.

If this simple textual apprach, supported by the Australian cases, had been followed there would have been no problem. But Das J. in a desperate effort to increase the State's power to acquire property without paying compensation, confused the whole issue by introducing American concepts and identifying Article 31 (1) with the "police power" of the State and Article 31 (2) with the doctrine of Eminent Domain. This view was first put forward in Chiranjit Lal v Union[169] where the Court relying on the Australian case held that a shareholder was not entitled to compensation simply because the Government had taken over the management of the petitioner's company. Das J. put forward his theory that Article 31 (1) contained a police power which gave the State wide powers to deprive without payment of compensation[170] (in addition to the power to restfict the use of property in Article 19[171] and the power to promote public health and prevent danger to life and property[172] in Article 31 (5) b (ii)). Mukerjea J. for the majority rightly thought

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169. A.I.R. 1951 S.C. 41.

170. A.I.R. 1951 S.C. 41 at pr.78 p.63.

171. Article 19(1) "All citizens shall have the right [illegible]- (f) to acquire, hold and dispose property." "(5) Nothing in sub claus(e) ... (f)(of Section 1) shall affect the operation of any existing law in so far it imposes, or prevent(s) the State from making any law imposing reasonable restrictions on the exercise of the right conferred ... either in the interests of the general public or for the protection of the interest of any schedule tribe."

172. Article 31(5) "Nothing in clause (2) shall affect:- ... (b)the provisions of any law which the state may hereafter make:- (ii) for the promotion of public health or the prevention of danger to life or property."

that these American concepts were irrelevant.[173] Indeed as long as the Court kept away from these ideas it evolved a practical approach.[174]

In Subodh Gopal v W. B.[175] the whole Court held that Section 7 of the Bengal Revenue Sales (West Bengal Amendment) Act (7 of) 1950, which made restrictions preventing landlords from evicting their tenants and causing all pending suits to abate for compensation, was intra vires Article 31 (2). This was in keeping with the whole Court's view that substantial rights were not taken away.

But once again Das J. referred to the arguments he had raised in Chiranjit Lal's case. He argued that the police power in Article 31 (5) b (ii) was "too narrow" to suit the complex problems of modern states.[176] Declaring his willingness to allow a "sense of the sanctity of private property (to be) shocked ... (by being left to) the unfettered mercy of the legislature",[177] he quoted American authority (especially a judgement of Holmes J.)[178] for his wider view of police power, giving six examples of a possible exercise of the power of acquisition, which would not fall within Articles 19 and 31 (5).[179]

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173. A.I.R. 1951 S.C. 41 at pr.56 p.56.

174. See D.K.Nabhirajah v Mysore A.I.R. 1952 S.C. 339 at pr.18 p.342 (per N.C.Aiyar J. for Shastri, Mahajan, Mukerjea and Das JJ.).

175. A.I.R. 1954 S.C. 92.

176. Ibid at p.110 col.2. Reason (iv).

177. Ibid at p.110 col.1.

178. He cites at p.111 col.2. Willoughby: III Constitutional law of the United States 1774; Enbank v Richmond (1912) 226 U.S. 137; Holmes J. in Noble State Bank v Haskell (1910) 219 U.S.104.

179. Ibid at pp.110-1. The six examples are (1) acquisition of obscene pictures (2) requiring bank guarantee deposits (as in the Holmes judgement supra f.n.178) (3) stoppage of trams resulting in management by the State (4) control of black marketeers (5) opening up congested parts of towns (6) the destruction of property by fire brigades.

In actual fact his six examples quite easily fall within the exercise of powers allowed by Articles 31 (5) and 19 (5).[180] Further, American jurists[181] writing at the time when Das J.'s American authorities were written suggest that Das J. exaggerated the American position. His reference to Holmes J. ignores the fact that Holmes J.'s opinions were in themselves extremely controversial[182] and also the fact that Holmes J. left open the question about the width of the police power in the case relied on by Das J.[183]

Das J. followed an extremely doctrinnaire approach and seemed to attack a theory of individualism and an orthodox system of Constitutional interpretation based on Blackstone,[184] instead of concentrating on the simple issue before the Court. The majority naturally assumed a doctrinnaire reply. Shastri C.J. replied:

> "(S)ocial welfare is not inconsistent with the ownership of private property and does not demand arbitrary expropriation of such property without compensation. On the other hand as pointed out by Blackstone: 'The public good is in nothing more essentially interested than in private rights as modelled by the municipal law.'"[185]

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180. With reference to f.n.179. Examples 2,3 and 4 do not involve an acquisition by the State. Examples 1 and 6 fall within Article 31(5)b(ii). Example 5 is a complicated example of Town Planning Law, which cannot really be considered as a police power, though if it were it would come under Article 19(5) if the word "restriction" in that section were taken to include destruction as held after years of controversy in Narenda v Union A.I.R. 1960 S.C. 430. Examples 3 and 4 could also be controlled under Article 19(6).

181. See R.A.Brown: Due process of law, police power and the Supreme Court (1926-7) 40 Har.L.R. 943 at 957 ff.; ibid: Police power: Legislation for health and personal safety (1928-9) 42 Har.L.Rev. 866.

182. For an account of Holmes J.'s controversial position in Constitutional law see Frankfurter: The Constitutional opinions of Mr. Justice Holmes (1916) 29 Har.L.R. 683; Ibid: Twenty years of Mr. Justice Holmes' constitutional opinions (1923) 36 Har.L.Rev. 909; Mr. Justice Holmes and the Constitution (1927) 41 Har.L.Rev. 121.

183. See Noble State Bank v Haskell (1911) 219 U.S. 104 at 112.

184. A.I.R. 1954 S.C. 92 at p.107 col.1 (where he refers to both Blackstone and Grotius).

185. Ibid at pr.18 p.100 col.2 (see also his comments at p.101 quoting from Cooley: I Constitutional Limitations (8d) 535.

In this way a small point of law was converted into a broad controversy about the individual and the State. This could have been avoided, for Jaganadhdas J., who supported Das J.'s emphasis as regards when compensation must be paid, did not approve of his finding American parallels to the provisions of the Indian Constitution.[186]

There was however a difference of emphasis between the views of the minority (Das and Jaganadhdas JJ.) and those of the majority although all agreed that Article 31 (2) did not apply to the present case. The minority felt that compensation should be paid, not for all kinds of deprivation[187] but only where property was requisitioned or actually acquired,[188] whereas the majority were willing to pay for substantial deprivations of the rights which constitute property.[189]

This whole dispute about legal interpretation was reenacted in Dwarkadas's case[190] which was a continuation of Chiranjit Lal's case.[191] The State, which had taken over the management of the petitioner's company, called up the unpaid capital, which in the context of the petitioner meant paying Rs.1,62,000. The whole Court agreed that this altered the situation[192] and that the petitioner's right to property had been violated. Das J. once again put forward his earlier views,[193] which were

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186. Ibid at p.118 col. 1.

187. Ibid at p.118 col.1 (per Jaganadhdas J.)

188. Ibid at p.115 pol.2 (per Das J.).

189. Ibid at p.99 col.2 (per Shastri J.)

190. A.I.R. 1954 S.C. 119.

191. A.I.R. 1951 S.C. 41.

192. A.I.R. 1954 S.C. 119 at 130-1 (per Mahajan J.). His distinctions were accepted by Bose (at pr.72 p.138), Hasan (at pr.75 p.139) JJ. See also Das J. at 135.

193. Ibid at 136.

rejected by the majority.[194] The majority, driven into emphasising that Article 31 (1) was not connected with police power but was interrelated to Article 31 (2) emphasised a test based on "substantial deprivation" in the former Article rather than "taking possession of" or "acquiring" in the latter.[195] But it was no more than a point of emphasis.

This emphasis on "substantial deprivation" rather than a practical following of the Australian case (which had been approved) was soon to become a normal feathre in the Court, and gave the wrong impression that the Court wanted to compensate every feasible kind of deprivation. In Saghir Ahmad v U. P.[196] the High Court at Allahabad held that the new scheme of nationalisation of motor routes was a mere deprivation of the petitioner's interest and did not create a compensatable interest.[197] But when the matter came up before the Supreme Court, the Court emphasised "deprivation" instead of "taking possession of" and "acquiring", and held that compensation must be paid. What is more important is that the Advocate General even conceded the point, as Subba Rao J. observed in a later case.[198]

Shastri C.J., after retirement, told the Madras lawyers' conference[199] that the Court had in fact not sought to compensate every case of deprivation, but had in fact decided quite the opposite. This is

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194. Ibid at pr.18 where Mahajan J., quoting Willis: Constitution law 716 (see also conclusion at pr.23 p.128) held that Article 31(1) and (2) both related to American Domain. The other majority judges (Bose J. at p.138; Hasan J. at p.139) do not talk about eminent domain, but do stress that Articles 31 (1) and (2) are interrelated.

195. Ibid at 138 (per Bose J.).

196. A.I.R. 1954 S.C. 728.

197. In the High Court the case was Motilal v U.P. A.I.R. 1951 All.257

198. A.I.R. 1954 S.C. 728 at 740 col.1. See also Subba Rao J. in Deep Chand v U.P. A.I.R. 1959 S.C. 648 at pr.38 p.669.

199. The proceedings are reported in A.I.R. 1955 Jnl. 25-30; see the summary at (1955) 1 M.L.J.Jnl.3. Note that the resolution at p.6 however talks in terms of the individual and the State.

borne out by their ultimate decision in Subodh Gopal's case, which had decided in favour of the Government.

The Government, confused perhaps by the Shastri-Das JJ. dialogue on the individual and the State, and perturbed by Das J.'s forced interpretation that the "police power" in the Constitution was inadequate,[200] amended the Constitution limiting the operation of the compensation requirements to cases of requisition and where the State actually acquired the right to ownership and possession.[201]

These cases illustrate aptly the confusion that can be caused by judges making unnecessary references to foreign doctrines and discussing the point in issue in a wider context of a doctrinnaire discussion about the individual and the State. In actual fact, the differences between the majority and the minority were much narrower than they were made out to be. The Court had mentioned "substantial deprivation" only in passing, but soon, more a result of the public controversy than the Court's desire to take an individualist's stand, it became the established test for all cases to which the Amendment did not apply.

In three cases[202] that followed, the Court automatically assumed that the real test to determine whether compensation needs to be paid was the "substantial deprivation" rather than an analysis of whether rights had been taken over and acquired, even though there

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200. See the Statement of Objects and Reasons to the Fourth Amendment 1955 Gaz.Ext.Pt.I.S.2. p.745; the Statement of the Minister of Law (1955) L.S.D. Vol.II Part II col.2005.

201. Article 31(2) was redrafted and Article 31(2)A was added to the Constitution.

202. Bhikajee v M.P. A.I.R. 1955 S.C. 41 (Bose J. at pr.7 p.44 quoting his own view in Dwarkadas v Sholapur etc Co.Ltd. A.I.R. 1954 S.C.119); Shanti Swaroop v Union A.I.R. 1955 S.C. 624 at pr.10 p.628; Bombay Dyg. and Mfg.Co. v Bombay A.I.R. 1958 S.C. 328. See also Tika Ramji v U.P. A.I.R. 1956 S.C. 676 at pr.51 p.712.

were two decisions[203] where the Court took note of the words "taking possession of" or "acquired".

Finally, in 1959 Subba Rao J. writing the judgements in two cases[204] took care to end any remains of the controversy. He supported the substantial deprivation test and made much of the point that the Advocate General of U. P. had conceded this point in Saghir Ahmad v U.P.[205] But the substantial deprivation has come to stay as is evident from a 1965 decision.[206] Thus we can see how a public controversy, which stressed that the Court had taken a particular stand, in fact led to the Court taking the stand, which it was alleged to have adopted. This is accompanied by the usual erratic voting behaviour. Das J., who took the minority view in the 1954 cases, voted in favour of the substantial deprivation test in later cases.[207]

The controversy is by no means irrelevant even after the Amendment, Article 31 A proviso 2 uses the word "acquisiton" and lays down that compensation will be paid if the land of a person, under personal cultivation, below a certain ceiling was acquired. In two recent cases[208] the question was whether land given to a Panchayat for

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203. See Anand Behera v Orissa A.I.R. 1956 S.C. 17 at pr.13 p.19; Shantabhai v Bombay A.I.R. 1958 S.C. 332 at pr.6 (both these cases emphasised that the Government had not taken over contractual rights held by individuals). But these cases have another facet which is discussed in the section "The definition of property" (supra).

204. Deep Chand v U.P. A.I.R. 1959 S.C. 648 at pr.38 p.669-70; Gullapalli Nageshwar Rao v A.P.S.R.T.Corporation A.I.R. 1959 S.C. 308 at pr.6 p.315. This case law is reviewed in Union v Sudhansu A.I.R. 1971 S.C. 1594 at pr.9-10 p.1598-9. See also Mahendra Lal v U.P. A.I.R. 1963 S.C. 1017 at pr.13 p.1026. In this case and Deep Chand's case (supra) the Court took a narrower view of the doctrine of eclipse so that pre-Amendment provisions applied to statutes which would normally have been eclipsed. On this last point see Seervai (1967) 162-171.

205. A.I.R. 1954 S.C. 728 at 740.

206. M.P. v Chamalal A.I.R. 1965 S.C. 124 at pr.10 p.130.

207. He subscribed on this point to the decisions in Bhikajee v M.P. A.I.R. 1955 S.C.41; Tika Ramjee v U.P. A.I.R. 1956 S.C. 676; Deep Chand v U.P. A.I.R. 1959 S.C. 648; Gullapalli Nageshwar Rao v A.P.R.S.T.Corpn.A.I.R. 1959 S.C. 308. But he also participated in Shantabhai v Bombay A.I.R. 1958 S.C. 332.

208. Ajit Singh v Punjab A.I.R.1967S.C.856; Pritam Singh v State A.I.R. 1967 S.C. 930

communal purposes was such an acquisition. The majority relied upon the 1954 cases and held that the land was not acquired by the State.[209] But Hidayatullah J. (for Shelat J. and himself) stressed that though the person who lost his land got an indirect benefit, there was nevertheless an acquisition.[210] If the minority view becomes acceptable, the whole scheme of rural reform,[211] based on Cooperatives may be affected. Indeed, the minority view may have been motivated by a belief in the inefficaceousness of introducing these Cooperatives, as is evident from a comment by Hidayatuallah J., in an extrajudicial capacity :

> "If only political parties would leave these bodies (the Panchayats) ... alone, or if village elections were abolished and if ... control land tenures and ownership were not made over to them in the beginning, the Panchayats would function well."[212]

We can see how the Court, by talking in wide generalised terms and appealing to cosmopolitan jurisprudence, alarmed the Government into amending the Constitution, and the Amendment of the Constitution and the public controversy attendant to it, caused the Court to accept an interpretation which it had not wholly subscribed to. It is the cases discussed here which have been responsible for giving the Court the reputation of being "right wing" and "political". In actual fact, we can see that the allegation was a product of unnecessary reference to principles of American public law and an equally unnecessary exaggeration of a legal point of emphasis by political and public controversy.

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209. A.I.R. 1967 S.C. 856 at pr. 9 p.930.

210. Ibid at pr. 31 p.867.

211. See G. Myrdal: II Asian Drama 1339-56.

212 Hidayatullah: Democracy and the judicial process in India (1968) 38.

iv. The development of "reasonableness" as a due process concept.

The Constituent Assembly had taken particular care to draft a detailed Constitution, which dealt with each separate subject separately. Unlike the American Constitution, the Indian Constitution had specified the details which had to be considered while deciding a particular question, without leaving it to the judiciary to invent broad concepts to sustain a policy of judicial review. Thus separate and presumably unconnected Articles dealt with the power to tax,[213] the power to control trade and commerce,[214] the power to make reasonable restrictions on the use of property,[215] the power to acquire property for a public purpose on payment on compensation,[216] the power to acquire property in the interests of public health,[217] the power to deal with statutes connected with agrarian reform[218] and the duty not to discriminate between citizens.[219]

The early Court accepted this position. In Gopalan v Madras[220] (as we shall see later) the Court held that Articles 21-22 relating to preventive detention were not to be judged according to the concept of reasonableness in Article 19. Again, in a 1951 case[221] it was held that

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213. Articles 265 and 31(5)b(1).

214. Articles 301-9. But note that the individual's right to follow any trade or profession is dealt with separately in Article 19(1)(g).

216. Article 31(2).

217. Article 31(5)(b)(ii).

218. Articles 31(4)(6) and later Articles 31A, B (read with the Ninth Schedule).

219. Article 14 which guarantees "equality before law" and "equal protection of all laws".

220. A.I.R. 1950 S.C. 27. See Chapter IV.

221. Ramji Lal v I.T.O. A.I.R. 1951 S.C. 97

the power to tax was a separate power which must be considered separately. Gradually, however, the attitude began to change. In 1961[222] the Court admitted the possibility of taxation statutes being adjudged on the basis of the quality provisions in Article 14. In fact, gradually Article 14 came to be used for controlling even statutes which acquired property.[223] We have already seen an indication of this in Vajravelu's case[224] earlier in this Chapter.

In the area of property one of the basic problems was whether the concept of reasonableness in Article 19 (6) applied to statutes acquiring property under Article 31 (1) and (2). The early Court rejected Shastri C.J.'s theory that Article 19 related to capacity and Article 31 to concrete rights,[225] but at the same time accepted that Articles 19 and 31 were not interrelated because the latter dealt with cases of acquisition of property while the former could be invoked where there was an interference with the use of property other than a deprivation. This was first asserted in an obiter in Gopalan v Madras.[226] In three later cases[227] we get the impression that Articles19 and 31 can

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222. Moopil Nair v Kerala A.I.R. 1961 S.C. 552.

223. This was hinted in the minority views in Ghiranjit Lal v Union A.I.R. 1951 S.C. 41.

224. A.I.R. 1965 S.C. 1017 (the techniques involved are discussed supra).

225. This theory was first put forward in Subodh Gopal v W.B. A.I.R. 1954 S.C. 92 at pr.6-8 p.95-6. But see the comments of the other judges at pr.64 p.117 (per Jaganadhdas J.) pr.64 p.106 (per Das J.) pr.60 p.117. Hereafter the Court stated in Commr.H.R.E. v L.T.Sawmiar A.I.R. 1954 S.C. 282 that the Court had all proceeded on the assumption that Article 19 applied to abstract as well as concrete rights. The controversy was closed in S.M.Transport v Sanakaraswamigal A.I.R. 1963 S.C. 864 at pr.13 p.289 (on which see the comment in (1965) XIV IYBIA 476-8).

226. A.I.R. 1950 S.C. 27.

227. See Wazir v U.P. A.I.R. 1954 S.C. 415 at pr.8; Virendra v U.P. A.I.R. 1954 S.C. 447; Rajasthan v Nath Mal A.I.R. 1954 S.C. 307 (where Articles 19(1)(g) and 31(2) are used to achieve the same result).

both apply to cases of deprivation of property, but it is clear from the 1954 cases[228] and Bombay v Bhanji Munji that Article 19 applies when there is an interference with property and 31 only when there is a deprivation.[229] This view was followed in later cases.[230]

But in the meantime, two developments took place. Firstly, as we have seen, the Fourth Amendment Act 1955 made possible a larger number of deprivations under Article 31 (1) for which compensation would not be paid under Article 31 (2). Secondly, in Narendra v Union[231] the Court put an end to a long controversy[232] and held that the word "restriction" in Article 19 (5) included "deprivation".

The result was that after this decision read with the Fourth Amendment Act there were three kinds of acquisition of property - (a) under Article 31 (2) which required the acquiring statute to be for a public purpose and pay compensation; (b) under Article 19 where the statute had to be a reasonable restriction in the interest of the general public and (c) under Article 31 (1) where all that was required was a valid statute.

The court could have stuck to their view that Articles 31 (1) and (2) were interrelated and interpreted them so that 31 (1) dealt

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228. Subodh Gopal v W.B. A.I.R. 1954 S.C. 92; Dwarkadas v Sholapur Spg. and Wvg. Ltd. A.I.R. 1954 S.C. 119.

229. A.I.R. 1955 S.C. 41.

230. See Sadhu Ram v Custodian General A.I.R. 1956 S.C. 43 at pr.3; Barkya Thakur v Bombay A.I.R. 1960 S.C. 1203; See also Mudholkar J. in Somawanti v Punjab A.I.R. 1963 S.C. 151 pr.22 p.160-1.

231. A.I.R. 1960 S.C. 430.

232. For cases which left this point open see Gopalan v Madras A.I.R. 1950 S.C. 27; Subodh Gopal v W.B. A.I.R. 1954 S.C. 92; Dwarkadas v Sholapur Spt. and Wvg. Ltd. A.I.R. 1954 S.C. 119; Saghir Ahmad v U.P. A.I.R. 1954 S.C. 728; Coverjee v Excise Commr. A.I.R. 1954 S.C. 220; M.B.Cotton Assn. v Union A.I.R. 1954 S.C. 634; R.M.D.C. Chamarbaugwalla A.I.R. 1957 S.C. 699; Bombay Dyg. & Mfg. Co. v Bombay A.I.R. 1958 S.C. 328.

with the larger power of acquisition for public purposes and that Articles 31 (2) and (2A) merely laid down when compensation must be paid. But the Court wanted to connect the concept of reasonableness to acquisition statutes and in Kochunni v Madras[233] held that Article 19 would control all acquisitions under Article 31 (1). The Court, assuming the position Das J. had abandoned very much earlier, held that Article 31 (1) read with Article 19 was in fact the police power, and had to be interpreted with reference to the "judicial decisions of the United States".[234] What motivated the majority judgement (written by Subba Rao J.) was his belief that fundamental rights occupy "a transcendental position in our Constitution"[235] and that when interpreting the Constitution

> "The correct approach (was) ... first to ascertain what is the fundamental right of the petitioner and then to see whether the law infringes that right." 236

His lordship took the view that the welfare state must be within the framework of the provisions protecting fundamental rights.[237]

From the point of view of State powers, the concept of "reasonableness" in Article 19 is in fact much narrower than the concept of public purpose, which as we have seen earlier is very wide indeed. The

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233. A.I.R. 1960 S.C. 1080. For the view that this interpretation is right and the only obvious one see P.K.Tripathi: Constitutional provisions and problems of interpretation (in G.S.Sharma (ed) Property Relations in Independent India (1968)) 63 at 69-70. Note that Tripathi wrongly assumes that Subba Rao J. was speaking for a unanimous Court. In fact the minority did not pass any opinion on this point (see pr.75 p.1109).

234. Ibid at pr.30 p.1093.quoting from Willis: Constitutional law 727; Willoughby: III Constitutional law of the United States 1774; Holmes J. in the fifty year old case on bank guarantee deposits: Noble State Bank v Haskell (1910) 219 U.S. 104.

235. Ibid at pr.24 p.1091-2.

236. Ibid at pr.32 p.1096 quoting from Bhagwati J. in Basheshwar Nath v I.T.Commr. A.I.R. 1959 S.C. 149.

237. Ibid at pr. 31.

reason for this lies in the fact that under the concept of "reasonableness" the Court is concerned not merely with whether the public will be benefited but a large number of other considerations as well. The best description of the term "reasonable" was given by Shastri J. in Madras v V.G.Row[238] where he argued that a lot of factors go into deciding the meaning of the word as applied to a particular case, and observed :

> "In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part ... "

He added, however, that judges should show self restraint and remember that the impugned legislation was passed by an elected legislature. We can see that although Subba Rao J. refers to these observations and two American cases[239] for determining what is reasonable, he abandons Shastri J.'s view that there must be a presumption in favour of the legislation. Here, once again therefore, we get a plea for a broad-based system of judicial review in line with American cosmopolitan ideas. Subba Rao J., anxious that the concept of reasonableness be generally accepted was even prepared to hold that a similar concept be applied to preventive detention cases and that the majority view in Gopalan v Madras[240] be overruled. This broad view was not accepted by the other judges in the Court in the cases that immediately followed, either in the area of personal liberty[241] or in cases of acquisitions under Article 31(2)

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238. A.I.R. 1952 S.C. 196 at 200.

239. A.I.R. 1960 S.C. 1080. at pr.32 quoting from V.G.Row's case and citing Henry Webster v Peter Cooper (1869) 14 Law.Edn.510 at 517; Citizens Saving and Loan Assn. v Topeka (1877) 22 Law.Edn. 445-461.

240. Ibid at pr. 25.

241. See Kharak Singh v A.P. A.I.R. 1963 S.C. 1241. But now see R.C.Cooper v Union A.I.R. 1970 S.C. 564 at pr.64 (discussed Chapter IV).

In Sitabati Devi v W. B.[242] Sarkar J. (who had been a minority judge in Kochunni's case[243]) read a judgement for a unanimous Court in which he made it clear that Article 19 applied only to Article 31 (1) and not to Article 31 (2). In fact in one case reported in 1963,[244] the Court even gave the impression that the old case of Bhanji Munji,[245] which had held that Articles 19 and 31 were mutually exclusive, was still good law.

Subba Rao J., the minority judge in this 1963 case, appears not to have dissented on this point. But in S. M. Transport (p) Ltd. v Sankaraswamigal[246] Subba Rao J. for a unanimous Court seemed to accept the limitations imposed by Sitabati's case (even though he does not cite it) by referring only to the interrelation between Articles 31 (1) and 19. Again in Ishwarlal v Gujerat[247] the Court affirmed the view of the Gujerat High Court below, on this point,[248] which has been taken to mean that they approved of the view that Article 19 does not apply to Article 31 (2).[249]

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242. (1961) but reported (1967) 2 S.C.R. 945.

243. A.I.R. 1960 S.C. 1080 at pr.75 p.1109 (note that he had left his views open on this point).

244. A.I.R. 1965 S.C. 151 at pr.22 p.160-1.

245. A.I.R. 1955 S.C. 41.

246. A.I.R. 1963 S.C. 864 at pr.23. He constantly refers to Article 31(1) not 31(2) see pr.25 p.872; pr.28 p.872; twice in pr.29 p.872-3; and once while referring to Kochunni v Madras A.I.R. 1960 S.C. 1080 at pr.29 p.873 col.2.

247. A.I.R. 1968 S.C. 870 at pr.26 p.881.

248. See the High Court judgement (1967) Guj.620 at 634-5 which in turn appears to have relied on Shelat J.'s judgement in Mangalbhai v State (1964) 5 Guj.L.R. 329. Shelat J. appears to have changed his mind in R.C.Cooper v Union A.I.R. 1970 S.C. 564.

249. This is the opinion of the A.I.R. reporter and seems justified in view of the Court's approval of the High Court in the words "(I)t is sufficient to say that (on this point) the High Court's judgement ... adequately answers the objections" at pr.26 p.881.

But gradually the attitude began to change and in M. P. v Ranojirao Shinde[250] Hegde J. for a unanimous Court held that the M. P. Abolition of Cash Grants Act (16 of) 1963 was invalid because it acquired a "chose of action".[251] But he went on to observe :

> "The power conferred by Article 31 (2) is not a taxing power ... (and) cannot be utilised for enriching the coffers of the state, (which) cannot be considered a public purpose under Article 31 (2) ... (N)othing so bad could be within the contemplation of Article 31 (2). The article must be construed harmoniously with Article 19 (1)(f). If so construed it is obvious that that article does not include enriching the coffers of the state." 252

Here we get a clear indication of how Article 19 can be used to give a restrictive meaning to public purpose in Article 31 (2). But are we to assume that Sitabati's case was overruled sub silentio ? Evidently not. In two decisions[253] Shah J. held that Sitabati's case was good law. The second of these cases was reported in 1970 (after R.C.Cooper v Union[254] - the Bank Nationalisation case) but decided in 1968.

Ironically it was Shah J. who read the judgement for a 10 : 1 majority in R. C. Cooper v Union,[255] distorted the importance of Sitabati's case which he had previously accepted. He observed that Sitabati's case had accepted Bhanji Munji's case without discussion, thus ignoring the fact that Sitabati's case had in fact considered the implications of Kochunni's case and that Shah J. had himself treated it in that light. Again M. P. v Ranojirao Shinde[256] is treated as having dealt with the case law on the subject even though it does not even mention Sitabati's case.[257]

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250. A.I.R. 1968 S.C. 1053.

251. This aspect of the controversy is considered in Chapter II (supra).

252. A.I.R. 1968 S.C. 1053 at pr.8.

253. Shantilal v Gujerat A.I.R. 1969 S.C. 634 at pr. 52 p.653
Maharashtra v M.N.Rao (1968) reported A.I.R. 1970 S.C. 1157 at pr.17 p1164

254. A.I.R. 1970 S.C. 564.

255. Ibid. The comment on Sitabati's case is made at pr.54.

256. A.I.R. 1968 S.C. 1053.

257. See A.I.R. 1970 S.C. 564 at pr.55

Establising a link between Articles 19 and 31 (2) Shah J. observed :

> "Limitations under Article 19 (5) and 31 are not generically different for the law authorising the exercise of the power to take the property of an individual for a public purpose or to ensure the well being of the community, and the law authorising the imposition of reasonable restrictions under Article 19 (5) are intended to advance the larger public interest. It is true that the guarantee against deprivation and compulsory acquisition of property operates in favour of all persons ... whereas the positive declaration of the right to property guarantees the rights of citizens, (b)ut a wider operation of the guarantee under Article 31 does not alter the tru character of the right it protects. Article 19 (5) and Article 31 (1) and (2) operate to limit the exercise of the right to hold property." 258

In fact Shah J. went a step further, and altering the whole basis of constitutional interpretation, said :

> "In our opinion the assumption in Gopalan's case ... that certain articles in the Constitution exclusively deal with specific matters and, in determining whether the infringement of the individual's guaranteed rights, the object and the form of the State action along need be considered ... cannot be accepted as correct." 259

Thus the Court in its desire to protect the individual's rights rather than State action[260] sought to fuse together the varied concepts which the Constitution by its very length had sought to keep apart. The concept of reasonableness was now to apply to "preventive detention", "public purpose" and perhaps even "compensation." Further, The Court could fuse into the meaning of all these concepts any cosmopolitan legal principles which it thought appropriate. It is premature to predict what the implications of this complete change in approach will be.[261]

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258. Ibid at pr.46.

259. Ibid at pr.64 p.597. Note however Ray J.'s dissenting judgement at p.620.

260. See pr.46 p.596. "Impairment of rights of the individual and not the object of the state in taking the impugned action, is the measure of protection.(sic)To concentrate mainly on the powers of the state is therefore to ignore the true intent of the Constitution."

261. There has been very little case law on the subject. See Deokinandan Prashad v Bihar A.I.R. 1971 S.C. 1409 at 1413 col.2 (on Article 31(1) and 19); Bachan Singh v Punjab A.I.R. 1971 S.C. 2164 where the impugned legislation is held intra vires Articles 31 and 19, but no case law is cited). V.Lakshminarayana v State A.I.R. 1972 A.P. 19 at pr.12 p.27 (decided after R.C. Cooper's case) which assumes that Article 31(2) and 19(6) are not interlinked is clearly wrongly decided.

But we can see how the Fourth Amendment Act 1955 which was designed to increase State powers resulted in fact in decreasing them, in as much as the Court could now invoke the concept of reasonableness and had used the Fourth Amendment as a stepping stone in the arguments put forward incorporating the use of the concept.

Once again the result has been obtained by erratic voting behaviour, which is shown in the Table below.

TABLE IX - demonstrating the voting patterns of the judges in the cases in this subsection.

	1	2	3	4	5	6	7	8	9	10
Sinha	*	v		v	v					
Imam	v	+		v	v					
T.L.V.Ayyar					v					
Gajendragadkar			x							
Sarkar	v	x	*							
Subba Rao		*		*	+					
Wanchoo	v		v	v						
Hidayatullah						v	*		v	
Das Gupta			v							
Ayyangar			v	v	v					
Mudholkar					*					
Shah	v	v		v				*	*	*
Sikri										v
Bachawat						v				
Ramaswami									v	
Shelat										v
Mitter								v	v	v
Vaidialingam						v	v			v
Hegde						*		v		v
Bhargava							v			v
Grover						v		v	v	v
Ray										x
Reddy										v
Dua										v

Key

v = participation x = dissent with judgement

+ = dissent without judgement * = majority judgement

1 = Barkya Thakur v Bombay A.I.R. 1960 S.C. 1203

2 = Kochunni v Madras A.I.R. 1960 S.C. 1080

3 = Sitabati v W. B. (1967) II S.C.R. 945

4 = S. M. Transport (P) Ltd. v Sanakaraswamigal A.I.R. 1963 S.C. 864

5 = Somawanti v Punjab A.I:R. 1966 S.C. 151

6 = M. P. v Ranojirao Shinde A.I.R. 1968 S.C. 1053

7 = Ishwarlal v Gujerat A.I.R. 1968 S.C. 870

8 = Maharashtra v H. N. Rao AIR. 1970 S.C. 1157

9 = Gujerat v Shantilal A.I.R. 1969 S.C. 634

10 = R. C. Cooper v Union A.I.R. 1970 S.C. 564

Note : Subba Rao J.'s dissent in case 5 was not on this point; in fact he agreed with the majority judgement on most points, including presumably this one.

It will thus be clear from the case law that the voting pattern is by no means consistent, except as regards Gajendragadkar, T. L. V. Ayyar, Ramaswami, Bachawat, Sikri, Ray, Reddy, Dua JJ. who appeared in only one of the cases which dealt with the point under discussion. Shelat J. appears to have taken a different view from the one he assented to in R. C. Cooper v Union[262] in a case decided by him as Chief Justice of the Gujerat High Court.[263] Sarkar J., who wrote the opinion in Sitabati's case, however, voted consistently. Subba Rao J. who wanted

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262. A.I.R. 1970 S.C. 564

263. See Mangalbhai v State (1964) 5 Guj. L. R. 329

to incorporate a wide view in Kochunni's case and seemed impliedly to accept the reservations imposed by Sarkar J. in Sitabati's case, in case 4 appears to have overlooked that the far more restrictive Bhanji Munji view was accepted in Somawanti v Punjab.[264] Although Somawanti's case dealt with a statute before the Amendment, it must not be forgotten that the comments in that case made no mention at all of Kochunni's case. The Amendment was one of the factors responsible for, but not the main reason for, the Kochunni view, which was in fact influenced by the view in Narendra v Union[265] that a restriction in Article 19 could include a "deprivation". All the other judges seem to have changed their minds at some stage. Consistency was sought to be gained by the misleading statement in R. C. Cooper's case that Sitabati's case was per incuriam as it had not discussed the issue. While it is true that the judgement in the latter case is only two pages, it is submitted with respect that Sitabati's case had in fact discussed the point at issue and was accepted as having done so in cases 8 and 9, in which Shah J., the author of the R. C. Cooper ruling, had read the judgement of the Court.

Once again we can see how the judges by inconsistent voting patterns had changed the whole basis of constitutional interpretation in India and expanded the reasonableness test to situations to which it was not intended to apply. In as much as the Court can freely resort to any principles to determine the content of reasonableness, this approach resembles the substantive due process approach adopted by American Courts at the turn of the century.[266] But we have to wait and see how the Courts will use reasonableness in the much wider area of applicability granted to it

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264. A.I.R. 1963 S.C. 151.

265. A.I.R. 1960 S.C. 430.

266. On substantive due process see Chapter III Section 2 (i) (a).

6. Conclusion

The right to property has become the most controversial of the fundamental rights. The citizen and the lawyer have challenged every kind of restriction that the Government has imposed on the right to property. This has infused and made popular the Western belief that a man's property is his own and that he can use the provisions of the Constitution to protect it. This is at variance with the Indian attitude that claims to property must be considered together with the demands of others, rather than considered exclusively. The Court seems to have considered the problem of agrarian reform and the issues of compensation and "public use" as exclusive problems considered in the light of western jurisprudence rather than issues where the claims of others have to be considered, and adjusted in an Indian context. In a sense the Supreme Court seems to perpetuate a colonial, if not foreign, legal system unaffected by Independence - the law is not yet independent.

But as we have already seen, the Court has not actively invalidated statutes as ultra vires the Constitution's protection of property rights. In effect, the Court has used all possible techniques to acquire judicial review in such areas whence Parliament had taken away the power of judicial review. It thus made extensive and selective use of the doctrine of colourable legislation and of extrinsic aids to interpretation to review statutes connected with agrarian reform and the compensation provisions of statutes generally. But the voting pattern has been inconsistent, which makes it impossible to ascertain whether the Court was motivated more by a desire to keep alive the ideas of western jurisprudence than to acquire a power of review. The Court's insistence that principles of compensation must be based on "recognised principles" suggests an affinity to cosmopolitan principles greater than that demanded by a mere desire for judicial review.

One of the biggest jurisprudential problems concomittant with underdevelopment is how to adjust the concept of equality to the problem of economic growth.[1] The problem lies in trying to reconcile tremendous economic changes, as a result of which the vested interests of a large number of people are bound to be affected, with the heavy theoretical interest that western thought places on the need to preserve equality and fundamental rights. An economist has indeed argued that adherence to the equality principle is important to decrease the differentials that naturally arise as a result of development,[2] but development presupposes a political rearrangement of property rights.

The Supreme Court has strictly adhered to the equality principle, even in areas where the Constitution allows positive discrimination to be made in favour of backward classes. Its view that the criterion of "backwardness" in Article 15 (3) of the Constitution is to be limited to economic considerations rather than caste or social criteria, reflects on the Court's desire to limit the use of principles of political discrimination only to areas of "need", rather than for the extensive solution of social problems.[3]

The Court seems to have worked on the assumption that fundamental rights must be protected at all costs, without making any attempt to consider other claims. As a result they have drawn upon an impressive body of western precedent on compensation and other matters, having assumed their validity in the Indian context. This becomes all the more important if we remember that the Court was prohibited by the

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1. See G.Myrdal: The challenge to world property:A world anti-poverty programme in outline (1971) See Chapter III "The Equality Issue" 63-89.

2. Ibid.

3. See further Chapter VII infra. p.585 ff.

Constitution and a series of Amendments from enhancing its power of judicial review.

By using the language of western ideas, the Court has sought to protect western "concepts" rather than property rights. Very little attempt was made to adjust these concepts to Indian purposes. Instead they have utilised western judicial techniques, like the doctrine of colourable legislation, to test the statutes intended to be amenable to tests based on Indian law, Indian experience and Indian hopes.

The whole process has been accompanied by an inconsistent voting pattern. In the early years Mahajan J.'s influence as a judgement-writer in cases on agrarian reform was fairly considerable. Das and Shastri JJ. played important moderating roles, but they too were caught up in western terminology and were responsible for beginning a dialogue, using such terminology, which was responsible for the Fourth Amendment. The advent of Subba Rao J. led to a reconsideration of the role of the Court. It was he who made it possible to by-pass the Fourth Amendment and enquire into the compensation provisions of impugned statutes, extend the concept of reasonableness to other parts of the Constitution and create the test of agrarian reform. In this he received some support from Shah J. who sustained and refined Subba Rao J.'s approach in later cases. But, like Subba Rao J., his voting pattern is by no means consistent. He also received partial support from Hidayatullah J. who pointed out that Subba Rao J. had in fact made selective recourse to the Statement of Objects and Reasons of the Fourth Amendment while trying to establish the agrarian test. Again, he openly admitted in Shantilal's case that he did not approve of the application of Subba Rao J.'s views on compensation to post-Amendment situations. But the major opposition to Subba Rao J. came from Sarkar J. who dissented on the use of the agrarian reform test, evolved a wide concept

of public use, and limited the move to make extensive use of the concept of reasonableness. Again it was Sarkar J. who protested against the Court's assuming a reforming garb and doing away with the right to preemption. But Sarkar J.'s contribution has been generally neglected. In fact, an eminent lawyer has referred to him as a mediocre judge.[4] It appears that he was one of the only judges who considered the matter from an Indian point of view without making unnecessary reference to western doctrines and without going to the other extreme of following strictly the doctrine of literal interpretation, as Wanchoo J. (notably a Civil Service Judge) appears to have done in the cases on "public use" and the cases that led to the Seventeenth Amendment.

Thus we can see that although the new powers of review have emerged slowly after inconsistent voting and some opposition within the Court itself, in the main all the judges appear to have approved of the new approach of the Court. In effect the Court, prompted partly by Constitutional Amendment, appears to have acquired powers of review, and used them to sustain in India the principles of western jurisprudence.

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4. Setalvad: My Life (1971) 162,343

CHAPTER IV

THE SUPREME COURT AND LAW AND ORDER WITH SPECIAL REFERENCE TO PREVENTIVE DETENTION

1. The problem of law and order

The Supreme Court has not only sanctioned the continued operation of an extremely severe law of preventive detention, but also approved of large numbers of statutes connected with the maintenance of public order on the grounds that they do not violate the civil liberties that the Constitution purports to guarantee. In spite of this the Court appears to have been involved in very few controversies arising out of dissatisfaction with the position it has taken. More recently the present Chief Justice of India (in a personal interview) recounting the policy of the Court said that it was merely interested in ensuring that the proper procedure has been followed and that there was no male fide or excessive use of power. He said :

> "We feel constrained not to accept appeals to personal liberty, the Constitution clearly gives the Government the power. It is right that they should have it. Our concern is to ensure that it is used for the purposes for which it is given." 1

This is an accurate description only of the formal attitude of the Court. In actual fact the Court has in the past often made appeals to personal liberty,[2] and begun to interfere fairly substantially in broad matters of executive discretion. The Table below demonstrates the incidence of intervention by the Courts.

TABLE I showing the extent to which the Supreme Court intervened on behalf of the petitioner in cases on Preventive Detention and under the Defence of India Act 1962.

Date	Total No. of cases	No. of cases in which petition or appeal allowed.	%age of 3 to 1
1950-64	32	9	26.7
1964-68	24	10	41.67
1968-70	18	12	66.7

Source: The cases reported in the A.I.R. on Article 22(4) to (7) of the Constitution (including those under the Jammu and Kashmir P.D.Act 1964)

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1. After his talk at the Institute of Advanced Legal Studies, London, June 21 1971.

2. See analysis of Gopalan v Madras A.I.R. 1950 S.C. 27 (infra); Mahajan J. in Gopalan's case at pr.136 p.82; Hegde J. in Motilal v U.P. A.I.R. 1968 S.C. 150 at pr.12 p.1513; Ramaswami J. in Abdul Karim v W.B. A.I.R. 1969 S.C. 1021 at pr.13 p.1034.

for the years 1950-64, 1968-70 and cases under the Defence of India Act 1962 for the years 1964-68. Note: The figures relate to the total number of reported cases (including multiple appeals and petitions) and not the number of petitions.

Even though the incidence of intervention is by no means low, the policy of the Court is acceptable to the Government, though not to Indian academic lawyers[3] and foreign observers.[4]

The reason for this lack of controversy in this area is because the Supreme Court's formal attitude not only follows the Common Law approach to the problems of public order, but has responded very sympathetically to the administration and society's view that authority cannot be challenged at the expense of public order. In actual fact they have silently assumed an unnoticed pattern of review, as we shall see later.

An eminent American jurist has observed :

> "(F)irst place must be given to the social interest in general security ... even if we accept the view that it is what shocks the general conscience, not what threatens the general security that is repressed ... It should be noted how the exigencies of the general security outweigh the traditional theory of criminal law." 5

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3. See N.C.Chatterji and Parmeshwa Rao: Emergency and the law (1967); C.S.Subramaniya Aiyar: Procedural due process and procedural safeguards in the Constitution (1959) S.C.J. Jnl. 156; P.K.Tripathi: Preventive detention - the Indian experience (1960) 9 Am.Jnl.of Comp.Law 219; C.A. Alexandrowicz: Personal liberty and preventive detention (1961) 3 J.I.L.I. 445; V.G.Ramachandram: The law of preventive detention A.I.R. 1954 Jnl. 53; V.Maya Krishnan: Emergency and personal liberty (1966) 8 J.I.L.I. 428; A.S.Bedi: Freedom of expression and security (1966 Delhi) see conclusions after comparisons with the position in the United States and England at 437-460; B.P.Srivasyava: Right against arbitrary arrest (1969) 11 J.I.L.I. 29 at 43-9; M.C.J.Kagzi: Judicial control of administrative discretion under preventive detention laws: An Indian experience (1965) P.L. 49.

4. See particularly D.Bayley: Preventive detention in India (1962 Calcutta) supplemented by D.Bayley: The policy of preventive detention (1964) 10 Jnl. of Public Administration 235; Grossman: Freedom of expression in India (1956-7) 4 U.C.L.A.L.Rev. 64; G.O.Koppel: The emergency, the Courts and the law (1966) 8 J.I.L.I. 428.

5. R.Pound: III Jurisprudence (1959) 291-2 referring to Grotius: De Jure Belli Ac Pacis III, 20, 7; Montesquieu: The spirit of the laws Bk.26 Chapter 23; Gov. v Meredith (1792) 4 T.R. 794 at 797; Case of the King's Prerogative in Saltpetre 12 Coke 12 (1607 K.B.); Cf.Noy, Maxims (1641) No.26. See also J.Stone: Social dimensions of law and justice (1964 Stevens) 294; G.Levasseur: Justice and State security (1964) 5 Jnl. of the Int.Comm.of Jurists 234-246.

This emphasis on general security has been repeatedly made in the Lok Sabha,[6] as well as by the administration[7] in India. A similar emphasis has been made in the Kerner Commission Report (1968) which enquired into the causes of racial violence in America.[8] The Governments in several other countries, whether belonging to the Common Law system or not, have generally assumed vast powers to deal with public order problems,[9] though not without criticism.[10]

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6. See generally D. Bayley: Preventive detention in India (1962) Chapter II and note the summary at pp.13-4; Government publication: Communist violence in India (1950). Selected speeches of Indira Gandhi (1971) The cult of violence pp.14-17.

7. e.g. S.S.Dhavan, Governor of W.Bengal (formerly a lawyer and a judge) states in a letter to the writer, who queried his request for a revival of the Preventive Detention Act: "Official secrecy prevents me from saying much ...(D)o not forget that no administration can tolerate a breakdown in law and order. The powers I asked for are necessary, but we must ensure they are not abused." Letter dated March 3 1971. For a glimpse of the problems in Bengal at the time see "Pre-election violence and murders threaten to extinguish Parliamentary democracy in India" Times Feb.22 1971. See generally "New arrest powers sought by Delhi" Times Nov.21 1970.

8. Reprinted Bantam Books (1968) see e.g. 288. But emphasis is also laid on getting to the root of the problem of racial violence.

9. See for example: Spain: Franco Emergency Bill attacked Times March 10,1971; France: Law and order reply by M.Chaban Dalmas Times Feb.22,1971; Turkey: Turkey's new law against anarchy defended Times Feb.10,1971 p.9; Uganda: President Amin revokes emergency Times Feb.22,1971; Georgia,U.S.A.: Emergency declared in U.S. riot town Times June 23,1971; Washington U.S.A.: See Fred Emery's description of the "formidable display of police and military action" Times May 4,1971; Bolivia: Emergency proclaimed in Bolivia Times June 23,1971; Singapore: Note the controversy about Lee Kuan Yew and the Press Times leading comment June 10,1971 and news report June 11,1971. Note also the position in Malaysia where the Sedition Act 1948 was amended in August 1969 to prevent any discussion of sensitive communal issues. Soviet Union: Soviet Supreme Court criticises judges for poor professional standards in "law and order" drive Times Feb.1,1971; England: See infra f.n.11,12,13, but see also Hansard: 778 H.C. Col.11089 (Feb.28,1969) and on violence 229 H.L. Col.422 (Feb.12,1969).

10. See for example Kenya: African lawyers new Bar Association condemns detention without trial East African Standard (Nairobi Edn,Aug.14,1971). I am indebted to Miss G. Buckee for sending me this press clipping.

Even in the United Kingdom following an increase in violence,[11] the Prime Minister[12] and others have made a general plea for a tightening up of the law in various areas of public order.[13] Demonstrations are not objected to, what is criticised is the violent form that they tend to take.[14] Still more significant is the fact that in British Ireland, the Government has assumed powers of detention without trial. The need for this is generally accepted and criticism has concentrated on the lack of procedural safeguards.[15]

More recently, in a procedure which has many a parallel in India, faced with a Court decision which made impossible the Army's

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11. Criminal Statistics for England and Wales (1970) Cmd. 4708. Violence against the person has increased from 37,818 offences in 1969 to 41,088 in 1970. For a good statistical summary see Times July 29,1971.

12. See Times Feb.21,1972 - Anarchy is theme for Heath Broadcast.

13. On picketing: John Clare: Bringing the rule of law to bear on the demonstrators Times Feb.26,1972; see also comments following the Aldershot bomb outrage Times Feb.23,1972; House of Commons reaction Times Feb.23,1972; for a typical reaction see R.Maclennan M.P. Hansard 831 H.C. col.1355-6; Times leader comment Feb.23, 1972 and for reaction in Eire see Times, Feb.24,1972; for earlier incidents see Times "Yard ordered to crush terrorists after new bomb attacks" June 23 1971.

14. e.g. The Guardian editorial on the Trade Union march in Feb.1971 - "The march was in the great tradition of British radical protests. Violence is not. It is also counterproductive." Dated Feb.23,1971. For the general law on demonstration and a review of the controls see D.G.T.Williams: Demonstrations in the streets (1968, Cambridge mimeographed). I am grateful to the author for a copy.

15. Detention is made under the Civil Authorities (Special Powers) Northern Ireland Act 1922. On the revival of the Act see the critical comments of Dr. C.Palley: Internment - the need for proper safeguards Times Nov.23,1971; The Comton Report (1971) Cmd. 4823 on allegations of brutality. Amnesty Report (1972) on the procedures followed generally see Times March 13,1972; For the opinion of Parliament on security in Ireland see Hansard 827 H.C. col.32-174; 826 H.C. col. 1572; On internment 826 H.C. 1572-1678 and for a typical criticism M.Rees M.P. at col.1663. See also the exchange of letters on whether the special powers contravene the European Convention of Human Rights - Dingle Foot Q.C.,M.P., Times March 3,1972 and J.Saywell, Times March 14,1972. On interrogation procedure see Letters to the Times on Nov.27,1971; Nov.26,1971; Nov.25, 1971. Detention is not approved of as a policy of prolonged use (see H.Wilson M.P. Times March 4,1972) but only until such time as violence ends (Government statement Times March 14,1972)

using the powers of preventive detention, the British Parliament has amended the Irish Constitution to enable the Army to maintain the policy of preventive detention.[16]

Thus it is generally accepted that in Common Law, civil Law and Communist countries alike,[17] the preservation of law and order is regarded as a priority and it is emphasised that protest must come through prescribed channels.[18] In general the emphasis has been on procedure rather than on making general pleas for preserving an undefined concept of liberty.

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16. The case is that of Hulme and others v R. (1972) Times Feb.24,1972 (See news report and leading article). See further M.Anderson Times Feb. 21,1972; the Houses of Parliament passed the Northern Ireland (Amendment) Act 1972. For the Debates see Hansard 831 H.C.D. 1363-1433, 1435-1450 (for a typical reaction to the Act see that of J.Thorpe M.P. at col.1435 ff. He proposed an amendment that the Act expire after a year, but it was defeated). See also Professor C.Palley: Northern Ireland - gaps that a one clause Act cannot close Times Feb.25,1972 and letter thereon by A.Buck M.P. Feb.26,1972. A well balanced account of the Irish situation is the Scarman Report Times April 7,1972,p.1, p.6 and leader at p.15. See also a comment by J.Whale Sunday Times April 9,1972 p.16. The Scarman Report stresses that police power though necessary must be exercised within the power granted to it. The most recent development is the Widgery Report (Times April20,1972, pp.4-5, extracts and comments) on the Army shooting 13 people on Jan.30,1972. The Report exonerates the Army, but casts doubts on its continued presence there.

17. See examples cited f.n. 9 and 10 supra.

18. For the best account of the theoretical Communist position on expression through the right channels see Lenin: Letter to G.Myasnikov August 5,1921; 32 Collected Works 504 at 508.

2. The Common Law Tradition

i. The position in England

The Common Law has evolved an extremely strict attitude to sedition as well as other aspects of public order like holding meetings and processions.

The law of sedition was calculated to give the State maximum protection. Thus a 1275 statute prohibited the publication of :

> "False views or tales whereby discord or occasion of discord or slander may grow between the king and his people and the great men of the realm." 1

In 1615 a clergyman was convicted of treason because of material in an unpreached sermon lying in his study.[2] Blackstone, who generally approved of the strict law of sedition,[3] disapproved of this decision.[4] In John Udall's case the jury was told :

> "not to enquire whether he (the defendant) be guilty of the felony, but whether he be the author of the book." 5

Judges, too, were severe, and in Tutchin's case (1704) Holt C.J. observed:

> "... nothing can be worse to any government, than to endeavour to produce animosities as to the management of it; this has always been looked upon as a crime and no government is safe without it being punished." 6

In sedition cases, "truth" was not permitted as a defence, even after Lord Campbell's Act 1843 permitted such a defence to be made

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1. III Edw. 1 c.34.

2. R v Peacham (1615) 2 State Trials 869.

3. See Volume IV Commentaries on the Laws of England (1854 Edn. hereafter Volume No. and Comm.) 151-2.

4. See IV Comm. 80. He disapproved of it on the grounds that it permitted precensorship. See also the case of R v Winterbotham (1793) 22 State Trials 823 where a clergyman was convicted for preaching that the King did not observe all the laws of the realm. His lawyer seems to have accepted the need for severe laws (p.838-48) and was content with the argument that his client did not overstep them.

5. (1590) 1 State Trials 1271 at 1283.

6. (1704) 14 State Trials 1095 at 1128.

in cases of defamation.[7] As late as 1909 Coleridge J. thought that prosecution for sedition, howsoever rare, was "a necessary accompaniment to every civilised government."[8] Gradually the law of sedition came to be used to control a breach of peace.[9] But the law of sedition is not the same thing as preventive detention, which was imposed in Britain during the First and Second World Wars, and more recently in Ulster. Despite notable dissents the Courts have accepted the need for preventive detention and refused to interfere with the subjective satisfaction of the Executive in this regard.[10]

There is a marked general reluctance even to take risks as regards offences relating to public order. Thus both the Common law and statute lay down that there is no unrestricted right to hold a public meeting. The highway (defined very widely[11]) is meant for passage only[12] and the citizen who wants to use it for any other purpose at once finds himself caught in a maze of statutory regulations on the use of highways and parks,[13] and illdefined powers like the sessional

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7. See Coke on the Case de Libellius Famosis Institutes Volume III 254; R v Almon (1770) 20 State Trials 803; Lord Campbell's statute see Section 4 of 6 and 7 Vict. c. 96. For cases after the statute see R v Duffy (1846) 2 Cox.C.C. 45; R v M'Hugh (1900) 2 I.R. 569; Ex parte O'Brien (1883) 15 Cox.C.C. 180.

8. R v Aldred (1909) 22 Cox.C.C. 1 at 3-4.

9. On the law of sedition generally see 7 Halsbury (3d) 569-570; A.S. Bedi (supra f.n.3) 26-73; Brownlie: Law relating to Public Order (1968) (hereafter Brownlie) 85-90.

10. R v Halliday Ex parte Zadig (1917) A.C. 260; Liversidge v Anderson (1942) A.C. 206 (note the dissent of Atkin L.J.). On this area see generally Schwartz: Law and Executive in Britain (1949) Chapter IX.

11. See 19 Halsbury (3d) 12; S.294 Highways Act 1959; see generally Brownlie (1968) 159 ff. H.Street: Freedom, the individual and the law (1971 3d) Chapter 2 pp.47 ff.

12. See however Harrison v Duke of Rutland (1893) 1 Q.B. 142; Hickman v Maisey (1900) 1 Q.B. 752 and Brownlie (1968) 131-7.

13. See Section 121 Highways Act 1959; S.28 Town Police Clauses Act 1847; S.54(6) Metropolitan Police Act 1959; Parks Regulation Act 1872 (as amended in 1926); Trafalgar Square Act 1844 and S.I.1952 No.776 made thereunder; S.82 London Government Act 1963 which gives powers to make bye-laws to the Middle and Inner Temple and S.58 of the Same Act which gives similar powers to local Councils.

orders of Parliament.[14] For the offence of "obstruction" under Section 121 of the Highways Act[15] there is some doubt as to whether actual obstruction is even necessary and the Courts have held that partial obstruction is sufficient to secure a conviction.[16] In addition to this the Police can invoke the Common Law of "Public Nuisance".[17] Here the obstruction must be substantial[18] but that is a question of fact and it follows that the procession must be small.[19]

The powers to control a breach of peace are very wide and under this broad caption[20] binding orders[21] can be made or the person charged punished for unlawful assembly,[22] assault, or battery.[23] In Duncan v Jones[24] the Courts widened considerably the offence of obstructing a policeman in the execution of his duty so that almost anything could be considered an obstruction, and even today such a wide interpretation cannot be altogether precluded.[25] In 1957, the Courts even

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14. See Parkhurst v Jarvis (1910) 101 L.T. 946; May's Parliamentary procedure (17d) 237. But more recently Papworth v Coventry (1967) 2 All. E.R. 41 at 45 suggests that Parliamentary orders may not be effective outside the House.

15. 39 Stat. 402. See also S.28 Town Police Clauses Act 1847; S.54(6) Metropolitan Police Act 1839.

16. For an earlier case see Gill v Carson and Nield (1917) 2 K.B. 74; now see Arrowsmith v Jenkins (1963) 2 Q.B. 561; Nagy v Weston (1966) 2 Q.B. 633.

17. On its background see Brownlie and Williams (1964) 42 Can.Bar Rev. 561; Smith and Hogan: Criminal Law (1969, 3d) 561-5.

18. e.g. per Denning L.J. (as he then was) in A-.G-. v P.T.A.Quarries Ltd. (1957) 2 Q.B. 169.

19. See R v Clark (1964) 2 Q.B. 315.

20. See G. Williams: (1954) Cr.L.R. 583 suggesting that this may itself be an offence, relying on Davies v Griffith (1937) 2 All.E.R. 671.

21. e.g. Beatty v Gillbanks (1882) 9 Q.B.D. 308; Wise v Dunning (1902) 1 K.B. 167.

22. R v Clarkson (1892) 17 Cox.C.C. 435.

23. O'Kelly v Harvey (1883) 15 Cox.C.C. 435.

24. (1936) 1 K.B. 218 relying on R v Prebble (1858).

25. See R v Waterfield and Lynn (1964) 1 Q.B. 164; Rice v Connolly (1966) 2 Q.B. 414.

accepted the revival of the offence of "affray" - an extremely wide offence[26] - which had fallen into disuse since 1845.[27]

A large number of controls on the conduct of a public meeting also exist[28] and in the remarkable case of Jordan v Burgoyne[29] the Court held that a person addressing a meeting shall be responsible (in public terms) for any effect that he may have on them, for he must take his audience as he finds them. Thus it appears that Courts have in the past sought to preserve the need to preserve public order giving wide powers to the police to enable them to do so.

More recently, there have been a large number of reports on the activities of the police and the exercise of police powers written[30] and a new statute for their organisation has been enacted.[31] But this has in no way changed the position that public order is a priority. Emphasis has been shifted on to procedure. It is notable that the activities of the police fall outside the jurisdiction of the Ombudsman.[32]

In addition to all these powers, the Home Secretary had been given wide powers during war time to deal with problems of security.

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26. R v Sharp and Johnson 1 Q.B. 552. See Smith and Hogan (supra f.n.17) 539 ff. It is not necessary that the offence be committed in a public place (see Buttons v D.P.P. (1966) A.C. 591 at 626) nor is it necessary that there be reciprocity of violence (see Scarrow (1968) Cr.App.Rep. 591).

27. The 1845 case is R v Hunt and Swanton (1845) 1 Cox.C.C. 177.

28. e.g. S.5 Public Order Act 1936; S.54(13) Metropolitan Police Act 1839; S.6 Race Relations Act 1965; S.1 Public Meetings Act 1908 (as amended) S.84 Representation of the People Act 1949.

29. Jordan v Burgoyne (1963) 2 Q.B. 744 (per Parker L.J.) See the incisive note by D.G.T.Williams (1963) 26 M.L.R. 425.

30. e.g. Mars Jones Enquiry (1963) Cmd. 2526; Skelhorn Enquiry (1964) Cmd. 2319 (on searches and seizures).

31. The Police Act 1964 - (44 Stats. 889)

32. The procedure is governed by the Police Act 1964 S.49 - but the wide powers of the Ombudsman are clearly lacking. On the exclusion of the police from the jurisdiction of the Ombudsman see the Parliamentary Commissioner Act 1967 S.4(1) read with Schedule II annexed to the Act.

While it is true that the citizen can challenge these powers by a writ of Habeas Corpus[33] it was held in Liversidge v Anderson[34] (which we shall discuss later) that the Courts will not interfere with the subjective satisfaction of the Home Secretary. Even today the Home Secretary has almost unlimited powers to deport aliens.[35]

ii. The position in the United States of America

In America the Courts have tried to protect free speech but not at the expense of public order.[36] In Cantwell v Connecticut[37] the Court set aside the conviction (under a Municipal Ordinance) of a Jehovah's witness who stopped Catholics to make them listen to a phonograph record attacking the established Church, but in Chaplinsky v New Hampshire[38] a person who called the City Marshall a "racketeer" and "fascist" was convicted for creating a public disturbance. In Terminello v Chicago[39] the Supreme Court, in contrast to the position in Jordan v Burgoyne (supra) set aside the conviction of a person who harangued his audience, but in Fiener v N.Y.[40] two years later the Court

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33. See O.Hood-Phillips: Constitutional and Administrative Law (1967) 449-58 for a brief survey of the scope of the Court.

34. (1942) A.C. 206. For a brief account of the war time controls see O.Hood-Phillips supra f.n.33 pp.459-61.

35. Ex. p. Soblen (1963) 2 Q.B. 243 (C.A.) and comment P.O'Higgins (1964) 27 Mod.L.R. 521; C.Thornberry (1963) 12 I.C.L.Q. 414. This case referred to the Indian case of Hans Muller v Suptd. Jail A.I.R. 1955 S.C. 367.

36. I am indebted to D.A.Wyatt B.A.(Cantab.) S.J.D. (Chicago) for allowing be to refer to his unpublished paper: The street speaker and a British Bill of Rights (1971, Chicago - in part fulfillment of the requirement for the S.J.D. 499 Course). I am also indebted for the help given me personally. See also A.S.Bedi: Freedom of security and expression (1966) 93-100; L.A.Stein: Municipal controls over freedom of assembly in Canada and the United States (1971) P.L. 115-140.

37. (1940) 310 U.S. 296.

38. (1942) 315 U.S. 568.

39. (1949) 337 U.S. 1.

40. (1951) 340 U.S. 315.

upheld the conviction of a University student who urged negroes to stand up for their rights. The Court has generally to prevent even excessive delegation of power in this area,[41] but has stressed the need for preserving public order and has even approved of a policy of prior restraint of activities liable to cause a disturbance.[42] The Court has followed the policy that it will go into the facts of each case to see if there was a threat to public order. This is exactly the policy that the Indian Supreme Court appears to have adopted under the Preventive Detention Act.[43]

The closest equivalent to emergency detention can be traced to the Espionage Act 1917 and the Sedition Act 1918. In the first of the cases[44] under the former Act, Holmes J. for a unanimous Court upheld the conviction of a man who had written letters through the mail to obstruct the recruitment of members of the Armed Forces. Holmes J., formulating what has been called the "clear and present danger test", observed :

> "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Congress has the right to prevent. It is a question of proximity and degree."

The Indian Court as we shall see later seems also to have adopted a similar test. But this test is much too ambiguous and both Holmes and Brandeis JJ. found difficulty in persuading their colleagues on the Court to accept the test in three cases involving two anarchists and a syndicalist.[45]

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41. See Kunz v N.Y. (1950) 340 U.S. 290.

42. See Hague v Commr. for Industrial Organisation (1937) 307 U.S. 496. See T.I.Emerson: The doctrine of prior restraint (1955) 20 Law and Contemporary Problems 648.

43. See Hidayatullah J. in Arun Ghosh v W.B. A.I.R. 1970 S.C. 1228.

44. Schneck v U.S. (1918) 249 U.S. 47.

45. Abrams v U.S. (1919) 250 U.S. 616; Gitlow v New York (1925) 268 U.S. 654; Whitney v California (1927) 274 U.S. 357.

But even though the Court has not sanctioned the clear and present danger test completely it has taken care to ensure that no person is convicted on the basis of guilt by association and in three cases reversed the conviction of three persons who were arrested merely because they were Communists.[46] The important thing to remember is that the Court has assumed an overall arbitral role in determining when a conviction is justified.

In 1940 the Alien Registration (Smith) Act was passed. S.2 made it unlawful knowingly to advocate or teach the overthrow of the Government, to print and distribute written matter to that end or become a member of a group that so advocates. S.3 made punishable a conspiracy to accomplish these ends. The Government, a little doubtful about S.2, used S.3 extensively. In two early cases, the Court refused to accept the view that the person could be convicted under the act on a guilt by association basis.[47] But in Dennis v Yates[48] by a 6 : 2 decision the Supreme Court confirmed the conviction of 11 Communist Party leaders. This attempt not to interfere with the administration's powers was however short lived and in Yates v U.S.[49] the Court by 6 : 2 ordered the retrial of 5 and released 5 Communists. The majority stressed the need to examine the facts of each case while the minority was prepared to declare the statute unconstitutional. The Court thus arrived at a position whereby it was willing to go into the facts to see for itself whether the conviction of the accused was justified. The constitutionality of S.2 had not been tested. In 1957 the Government

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46. Stromberg v California (1931) 283 U.S. 359; De Jonge v Oregon (1937) 299 U.S. 353; Hendon v Lowry (1937) 301 U.S. 242.

47. Schneiderman v U.S. (1943) 320 U.S. 118; Bridges v Nixon (1945) 326 U.S. 135.

48. (1951) 341 U.S. 494.

49; (1957) 354 U.S. 298; see A.S.Bedi (1966 supra f.n.36) 296-346.

conceded to procedural errors in two cases resulting in a reversal of convictions.[50] But in Scales v U.S. (1961)[51] the Court approved of the conviction of an active member of a subversive group and who had a personal intent to bring about the violent overthrow of the Government, though in Noto v U.S.,[52] decided on the same day, they let the appellant go free because there was insufficient information. The Court has approved as constitutional the Internal Security Act 1950 which allows forms of preventive detention.[53]

Thus it appears that the American Supreme Court has taken the view that though it will not interfere with Municipal and National laws calculated to preserve order and the security of the State, it will examine the facts for itself to determine whether the order is needed. This is important because without referring to any case law, the Indian Supreme Court following the English system of administrative law rather than the broad American system of Constitutional review seems to have placed itself in a similar position to the American Courts, as we shall see later. This is in spite of the fact that the Constituent Assembly took care to ensure that the Court was not given powers similar to those in the United States.[54]

More recently several American States have passes statutes of a preventive detention nature (not granting pre-trial bail) to preserve law and order, but no cases on their constitutionality have arisen.[55]

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50. Scales v U.S. (1957) 355 U.S. 1; Lightfoot v U.S. (1957) 355 U.S.2.

51. (1961) 367 U.S. 290;

52. (1961) 367 U.S. 290

53. Communist Party of U.S. v Subversive Activities Control Board (1961) 367 U.S. 1.

54. See infra . The Constituent Assembly was considerably influenced by B.N.Rau, whom G.Austin (The Indian Constitution (1966) O.U.P.) has shown took particular care not to adopt the American position.

55. In this see the article (writer anonymous) Constitutional limits on the conditions of pretrial detention (1970) 79 Yale L.J. 941-960.

3. The Indian Tradition

i. The right to revolt in Ancient India[1]

Unlike the West, Indian political theory does not provide a general recognition of a right to revolution or protest. As a result of the freedom movement, Indian writers began to search the ancient texts to discover a right to revolution and put forward the theory that sovereignty ultimately resides with the people.[2] One writer has even suggested the existence of a social contract theory which gives to the people a limited right to revolt.[3] It is certainly true that Indian political theory fears anarchy. The doctrine of matsya nyaya (big fish eating little fish) was an important theory[4] justifying kingship, but there is little indication that a right to revolt acrued on a failure to preserve law and order. It is however laid down that if the ruler does something which violates the terms of his office, the elements of the State on which he is dependant might indulge in subversion[5] for they have a right to be consulted. Again royal orders have been declared invalid by śāstrīs in principle if they conflict with dharma.[6]

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1. For a good account see J.W.Spellman: Political theory in Ancient India (1964) Chapter IX pp.225-243.

2. A.S.Altekar: State and Government in Ancient India (1958); Beni Prashad: Theory of Government in Ancient India (Post Vedic) Allahabad 1927). R.K. Gupta: Political thought in Smriti Literature (1970 Delhi). See 32. See further R. Lingat: The Classical Law in India (translated Derrett) Berkeley University of California Press (1972) 213-4, 220, 249.

3. N.C.Bandhopadhaya: Development of Hindu polity and political theories (1927-38; two parts: Calcutta) 234; B.Saletore: Ancient Indian political theories and institutions (1963).

4. See Manu VII, 14-20, and J.W.Spellman (1964) 4-8.

5. See Visvarupa's Balkrida (a commentary on Yājñavalaka Smriti)I,337 (corresponding to Yājñavalaka Smriti I, 340). See also Bharuci on Manu VII (I am grateful to Professor J.D.M.Derrett who is editing and translating this work for having given me a gist of the material contained in this work). See Manu VII, 111-112. See generally Kane III H.D. 198-9. Note also the Aitareya Barmana VIII, 15 (cited Spellman (op.cit.f.n.1.) 233. See generally D.H.Ingalls: Authority and law in Ancient India (1954) Supp. 17 Jnl. of the Am. Oriental Soc.

6. See Derrett R.L.S.I. (1968) 167.

A High Court Judge[7] has recently relied on the following verse of the Anuśāsana parva of the Mahabharata to justify a theory of revolt :

> "That king who tells his people he is their protector but who does not and is unable to protect them should be slain by his combined subjects like a mad dog." 8

A sceptical foreign observer accepts that this justifies a theory of revolt, although he is unable to see it justifying popular sovereignty.[9] In effect, however, such passages are rare and allow the people to revolt only when the King is unable to protect his subjects (failure of law and order) or plunders their wealth.[10] In actual fact of course even this theoretical right to revolt is not conceded.[11]

Revolts did occur in distant provinces,[12] and even closer home, but they were usually put down with severity, without crediting to the rebel or a nuisance (as the case may be) the status of a revolutionary, even though it is true that during Mughal days regional heroes like Shivaji did emerge.[13] The need for an army was always stressed - it was one of the 7 elements that constitute a State in Kautilya's Arthashatra.[14]

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7. S.S.Dhavan : Unpublished lectures at the National Academy Mussorie ₹ 1960-1.

8. Mahabharata Anūshāsana Parva LXI, 31,33; See also Shānti Parva LVII 44-5. I am grateful to Shree S.S.Dhavan for sending me these references. See also references cited Spellman (supra f.n.1) 236-8.

9. J.W.Spellman (supra f.n.1) 235.

10. See Apararka on Yājñavalkya I,340. I am indebted to Prof. Derrett for this reference. See also Yājñavalkya I 339-41; Kautilya I,VI,259; Manu VII, 111-2.

11. For a good general survey see Derrett: Rulers and ruled in Ancient India (1969) Recueils de Société Jean Bodin XXII Gouvernés et Gouvernants417.

12. An analysis of Bengal's rebellious background has recently been made by Ian Martin: East Bengal - a background study. This was an administrative report for the Ford Foundation. I am grateful to Ian Martin for sending me a copy and for permission to refer to it.

13. A revolutionary "myth" seems to have emerged around rebellious princes like Rana Pratap of Rajputana and Shivaji of Maharashtra, but it should be noted that these myths have a regional flavour about them and cannot sustain any break in the traditional attitude to revolt.

14. See Spellman (supra f.n.1) generally.

The Ancient texts, much as they might have frowned upon an adharmic king, look with horror at the prospect of a breakdown in law and order, because that would lead to matsya nyaya or the law of the fish. Treason was defined very widely so as not to exclude even Brahmins.[15] No theory like the Western theory of revolution[16] exists.

The freedom movement in India, directed against British rule, made Indians criticise the vast police powers that the British Government possessed and demanded rights similar to those of Englishmen.[17] The emphasis was not on revolution but on equality. In fact the advent of M. K: Gandhi brings out a significant Indian characteristic of the National Movement. The authority of the British was challenged but only because their government was not representative. Gandhi's theory of revolution[18] may well have been based on the idea of people's rule; it was certainly not accepted by the Constituent Assembly[19] which was content with achieving political independence from the British. What is more significant is the fact that even after 1947 the extremely strict British laws relating to public order were continued.[20] Post-Independence comments upon the laws under the British having been oppressive[21] tend to ignore the fact that India's vast public order problems are such that even the present day Government has used them to justify the need for extensive powers.

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15. See Arthashastra IV,XI,221. See generally J.W.Spellman (supra f.n.1)227-9

16. The theory emerged as a result of the Social contract theory, see for example John Locke's Second Treatise on Government (Laslett Edn.1960) 372; For recent developments on the concept of a legitimate revolution see W.C.McWilliams: Civil disobedience and contemporary Constitutionalism (1969) 1 Comp.Pol. 211; Ibid Violence and legitimacy (1970) 79 Yale L.Jnl. 623.

17. e.g. S.N.Banerjea: referred to in I History of the Indian National Congress 37; C.R.Das (1922) Congress Presidential Addresses(IInd Series 1935) 565,

18. On this see Erik Erikson: Gandhi's Truth (1970). A psychological theory which seems to suggest that even Gandhi did not evolve a consistent theory of revolution.

19. See G. Austin: The Indian Constitution (1966) 39-41.

20. See later f.n.35.

21. e.g.J.K.Mittal: Right to equality under the Indian Constitution (1970) P,L. 36

ii. The British attitude to law and order problems in India

From the start, the British assumed wide powers to deal with India's public order problems. As early at 1773 the Governor General of Fort William had the power to detain peremptorily anyone carrying on correspondence dangerous to the safety of the English settlements.[22] The formal policy of preventive detention was authorised by the Bengal State Prisoners Regulation (III of) 1819.[23] In 1908 the Criminal Law Amendment Act (14 Of) 1908 allowed speedier trials for special classes of offences. This policy has continued,[24] and has even been approved of by the Supreme Court as Constitutional.[25] There were also certain special statutes to give the Government wide powers of arrest and detention for public order and other purposes (including silencing opposition to the Government).[26] "Sedition" was very widely interpreted by Courts in India and the relevant provision in the Indian Penal Code 1860 has been declared constitutional by the Supreme Court of India.[27]

In 1939 the Defence of India Act (35 Of) 1939 gave wide powers of detention, the valid exercise of which depended on the subjective satisfaction of the detaining authority. The Courts accepted the fact

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22. East India Company Act 1773 discussed V.Bose: Preventive detention in India (1961) 3 Jnl.of Int. Comm. of Jurists 87 at 87-88.

23. See also State Prisoners Act (34 Of) 1850 (Bengal), (3 Of) 1858 (Madras and Bombay). For earlier enactments see Bengal State Offences Act 1804; Madras Regulation VII of 1808; Bombay Regulation XXV of 1827.

24. See also the Special Criminal Courts Ordinance 1942 which was declared ultra vires the Government of India Act 1935 in K.E. v Benoarilal Sharma A.I.R. 1943 F.C. 36 but it was reversed on appeal A.I.R. 1945 P.C. 48.

25. See infra.

26. e.g. Criminal Law Amendment Act 1915; Anarchy and Revolutionary Crimes Act (XI of) 1919.

27. Section 124A of the Indian Penal Code 1860. For a wide interpretation see Bal Gangadhar Tilak v Q.E. (1898) 22 Bom.112 at 135. For the Supreme Court case on the subject see Kedar Nath v Bihar A.I.R. 1962 S.C. 955. The Indian Law Institute has recently published a study on the Law of Sedition in India (1964)

that such powers were justified and took the view that their powers were limited to preventing a mala fide exercise of powers.[28]

It must be understood that all these powers were in addition to the provisions of the Indian Penal Code 1860 which contains a Chapter on "Offences against Public Tranquility"[29] and the Criminal Procedure Code 1898 which empowers arrests for certain purposes without a warrant,[30] gives a wide rule making power to Magistrates to enable them to preserve public order,[31] and sanctions the practice of getting certain persons to execute a bond for good behaviour.[32] But it is apparent that India's vast public order problems cannot be dealt with on the strength of these provisions.[33] In 1960, the Minister for Home Affairs told the Parliament that the Preventive Detention Act 1950 was in fact being used to solve day to day law and order problems.

> "(The bulk) of detenus have been detained for entirely unpolitical reasons and it (the Act) was mainly (used) in order to curb the activities of habitual goondas in the cities of Bombay and Calcutta." 34

Even after 1947, there have been a large number of statutes other than the Preventive Detention Act to facilitate the preservation of law

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28. See Keshav Talpade v Emp. A.I.R. 1943 F.C. 1; E v Shibnath Banerjee A.I.R. 1943 F.C. 75; E v Keshav Gokhale A.I.R. 1945 Bom.212; Emp. v Iqbal Krishna A.I.R. 1942 All. 253; Emp. v Purshottam Trikkamdas A.I.R. 1946 Bom. 333; Hari Krishan Das v Emp. A.I.R. 1944 Lah.33; Kamla Kant v Emp. A.I.R. 1944 Pat. 355.

29. Chapter VIII, I P.C. 1860.

30. Section 149.

31. Section 144.

32. Section 106-110.

33. See D.Bayley: Preventive Detention in India (1962) 69-75 for a discussion of this.

34. L.S.D. Dec.1,1960 col. 3410 quoted Bayley: The policy of preventive detention 1950-63 (1964) 10 Jnl. of Public Administration 235 at 251.

and order.[35]

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35. Assam Maintenance of Order Act (11 Of) 1947; Assam Maintenance of Public Order (Autonomous Districts) Act (16 Of) 1953; Bengal Criminal Law Amendment Ordinance (2 Of) 1947; Bengal State Prisoner's Regulation (Adaptation) Order 1947; Bihar Maintenance of Public Order (Ordinance (4 Of)) 1949 as amended by Ordinance 5 of 1949; Bihar Maintainance of Public Order Act (1 of) 1950; Bihar Preventive Detention Ordinance (2 of) 1950; Bombay Public Security Measures Act (6 of) 1947; C.P. and Berar Goondas Act (10 of) 1946 ; C.P. and Berar Maintainence and Restoration of Public Order and Collection of Fines (Indemnity) Act (2 of) 1945; C.P. and Berar Public Safety Act (62 of) 1948; Cochin Criminal Law Amendment Act (27 of 1124 M.E.) Criminal Law Amendment Ordinance (29 of) 1948; East Punjab Public Safety Act (5 of) 1948; Hyderabad Public Safety and Public Interest Regulation (8 of 1358 F); and 12 of 1358 F); Hyderabad Public Security Act (12 of 1348 F); Hyderabad Special Tribunals Regulation (1 of 1358 F); Hyderabad Special Tribunals (Validation of Proceedings) Regulation (1 of 1359 F); Indore Public Safety Act 1947; J and K Preventive Detention Act 4 of 2011 Samvat; J and K Public Security Act (14 of 2003 Samvat); Madhya Bharat Maintenance of Public Order Act (7 of) 1947; Madhya Bharat Maintenance of Public Order Ordinance (5 of) 1948; Madhya Bharat Public Security Act (12 of) 1953; Madhya Bharat Public Security Act (23 of) 1959; Madhya Bharat Public Security Measures Act (23 of) 1950; Madras Maintenance of Public Order Act (1 of) 1947; Madras Maintenance of Public Order Act (23 of) 1949; Madras Maintenance of Public Order Ordinance (23 of) 1949; Madras Maintenance of Public Order (Removal of Doubts and Amendment) Ordinance (1 of) 1949; Mysore Public Safety Act (12 of) 1949; Orissa Maintenance of Public Order Act (4 of)1948; Orissa Maintenance of Public Order Act (10 of) 1950; Patiala State Public Safety Ordinance (11 of 2003 Samvat); Pepsu Public Safety Ordinance (7 of 2006 Samvat); Punjab Disturbed Areas Act (1 of) 1947; Punjab Public Safety Act (2 of) 1947; Punjab Security of the State Act (12 of) 1953; Punjab Criminal Law Amendment Act (30 of) 1960; Rajasthan Public Safety Ordinance (9 of) 1948; Rajasthan Public Safety Ordinance (26 of) 1949; Saurashtra State Public Safety Measure Ordinance (9 of) 1949; Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of) 1949; Travacore Cochin Public Safety Measures Act (5 of) 1950; Travacore Emergency Powers Act (1 of 1122 M.E.); U.P. Maintenance of Public Order Act ... (11 of) 1949; U.P. Maintenance of Public Order Ordinance ... (2 of) 1949; U.P. Maintenance of Public Order Act (Temporary) Act (4 of) 1947; V.P. Prevention of Crimes (Special Powers Act, Temporary) Act (5 of) 1949; V.P. Criminal Law Amendment Act (Special Courts) Ordinance (5 of) 1949; W.B. Criminal Law Amendment (Special Courts Act (21 of) 1949; as amended by Act 12 of 1952; Act 24 of 1960; West Bengal Security Act (3 of 1943); West Bengal Security Act (19 of) 1950; West Bengal Security Ordinance (2 of 1949); West Bengal Security (Second Amendment) Ordinance (2 of) 1949; West Bengal Special Courts Act (10 of 1950); West Bengal Tribunal of Criminal Jurisdiction Act (14 of) 1942.

iii. The Constituent Assembly and Judicial Review of Preventive Detention. 36

The Constituent Assembly was faced with the problem whether they should incorporate the due process concept, which would allow the Court to enquire whether the law is justified and a proper procedure followed or simply allow the legislature to enact a law, providing such conditions as it saw fit. At first some attempt was made to follow the American concept of due process, and B. N. Rau's Draft Constitution of 1947 (clause 16) contained a due process clause. But B. N. Rau was a little alarmed at the prospect of giving wide powers of review to the Courts and by 1948 the Drafting Committee accepted the elimination of the due process clause. This was done without the approval of the Constituent Assembly and several Amendments (principally that of K. M. Munshi) were tabled asking for a reintroduction of a due process provision. Munshi urged that due process in America had been misused in the context of property and the liberty to contract, whereas in India it would be used only in a civil liberties context. But despite these protests, the Assembly accepted the view that Parliament must be allowed such procedure as it thought fit. The Assembly did however secure the enactment in the Constitution of provisions (amongst others) whereby detenus under a measure of preventive detention would have the right to

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36. I have based this account on G.Austin: The Indian Constitution (1966). The reason for this is that most of the decisions on this area took place outside the floor of the Assembly. Austin contains in fact the only compact account that we have, of the process. The Assembly debates themselves are more in the nature of protests at being faced with a fait accompli. Austin does not in fact indicate when the Constituent Assembly Debates took place. Discussion on this will be found at IX C.A.D. 1496-1570; XI C.A.D. 521-2; 531-6, 575-8 (B. R. Ambedkar's reply to criticisms).

See also the article of K.M.Munshi: Preventive Detention (1967) 2 All. Univ.L. Jnl. 12. Dr. Munshi was a member of the Constituent Assembly and portrays the tensions that existed in it.

receive grounds stating reasons for their arrest so as to enable them to make a representation against the detention (Article 22 (5) (6)).

The Constituent Assembly thus accepted the view that in preventive detention matters at least the Courts in India would play an extremely limited role. It will be seen later that the Supreme Court at first accepted the view that the American concepts should not be introduced, but later used English administrative law techniques and assumed an extremely important role in determining whether a detention is justified or not.

We now turn to the Supreme Court's attitude to law and order generally and to the specific problem of preventive detention.

4. The Supreme Court and Law and Order generally

We will see later that the Supreme Court took the view that where an "arrest" or "detention" takes place the Court will only ensure that the procedural safeguards of Article 22[1] have been followed. But where a Statute connected with a person does not arrest the person but merely restricts his freedom of speech by censorship or his freedom of movement by passing an externment order, the Court will examine the statute or the externment order to see if it is a reasonable restriction within the meaning of Article 19. Again, if the impugned statute prescribes a special procedure in certain cases or classes of criminal offences, the Court may enquire whether the statute violates the equality provisions of Article 14 of the Constitution.

In these cases the Court has not in fact evolved a substantive theory like that evolved by the American Supreme Court. It has not in fact asked questions like - is the restriction reasonable ? but has concentrated on applying English administrative law techniques e.g. has the statute delegated arbitrary and uncanalised power ? It seems to have concentrated not on trying to check the actual exercise of power or trying to discover whether that particular exercise of power was justified; instead it began with the attitude very popular in the 1930's that uncanalised power should not be delegated at all.[2] Gradually, like the rest of the Common Law world it gave up this stand and began to trust the executive more.

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1. Article 22 (1 and 2) lays down the procedure in cases or normal arrests; Article 22 (3 to 7) lays down the procedure in preventive detention cases.

2. This can be traced back to Dicey's rule of law (Law and the Constitution (10d)). This was taken up by Lord Hewart in his The New Despotism (1929) and prompted the Doughmore Committee Report (1932) Cmd. 4060.

In Romesh Thappar v Madras[3] and Brij Bhushan v Delhi[4] a majority of the Court held that Madras and Punjab statutes which imposed precensorship in the interests of public order in order to ease communal tension, were ultra vires Article 19 (2) which allowed reasonable restrictions in the interests of the security of State but not in the interests of public order, introduced by the Constitution (First Amendment) Act 1951, which they alleged was a much wider concept. The majority quoted Blackstone on the liberty of the Press and concentrated their attack on precensorship.[5] Fazl Ali J., the minority judge, referred to the English law of sedition to show that it was a wide concept and tried to show that public order was in fact connected with security of State,[6] but both the majority and the minority avoided making any mention of the problems of communal tension which had prompted the need for the statute in the first place. The distinction between public order and security of State was approved by the High Courts.[6] Fazl Ali (the minority judge) did however warn the majority not to

> "ignore the fact that public safety is the dominant purpose of the Act(s) and therefore ... not to be confused with an Act which is applicable ... to any and every breach of public order." 8

As a result of these cases, the First Amendment Act was passed, and Article 19 (2), to enable reasonable restrictions to be made in the interests of public order. Although after the Amendment the Court declared in an obiter that its earlier views had been misconstrued,[9] they used similar distinctions later.[10]

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3. A.I.R. 1950 S.C. 124.

4. A.I.R. 1950 S.C. 129.

5. Ibid at pr.25 p.134.

6. Ibid at 130.

7. Re Bharati Press A.I.R. 1951 Pat. 12; Srinivas v Madras A.I.R. 1951 Mad. 70; Indu Kumar v State A.I.R. 1951 Sau. 70.

8. At p.131 col.2.

9. Mahajan J.in Bihar v Shaibala Devi A.I.R.1952S.C.329 at pr.4 p.330 col.2.

10. e.g. see the discussion on the Preventive Detention Act (infra) - the Court managed to procure wide powers to review on the basis of a distinction between law and order and public order.

The Court's initial hostility to the statute was prompted by English law notions about precensorship and distrust of delegating to the executive too much power. These English notions about the delegation of power can also be traced in the Court's attitude while considering whether Acts providing for special procedures for the trials of certain offences were intra vires Article 14 of the Constitution. In W. B. v Anwar Ali Sarkar[11] the majority declared that Section 5 (1) of the West Bengal Special Criminal Courts Act 1950, whose object was the "speedier trial of certain offences", was ultra vires the equality provisions because it gave to the Government too wide a power to direct by general or special order that certain offences or classes of offences be tried by the procedure prescribed in the Act. The Court relied on American precedent on "equality"[12] and stressed that the Government could not be trusted with such wide discretionary powers,[13] which were inherent in the Act. Das J. (one of the majority judges) took the narrower view in that the Section was bad only because it gave the Government the power to refer individual cases for trial by this procedure.[14] Shastri J. in a powerful dissent argued that what should be invalidated was specific cases of discrimination and not the power itself. But in Kathi Ranning v Saurashtra[15] the same bench of the Court approved a similar provision (S.11) of the Saurashtra Public Safety Act 1949. Shastri and Das JJ. approved of the statute because it met

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11. A.I.R. 1952 S.C. 75.

12. Fazl Ali J. at pr.21 p.83 col.1; Mahajan J. at pr.36 p.85-6; Mukerjea J. at pr.42-3 p.88 and at p.92; Das J. at pr.56 p.94; Aiyar J. at pp.100-1.

13. Fazl Ali J. at pr.27 p.84; Mahajan J. at pr.39 p.87.; Mukerjea J. at pr.46 pp.91-3; Aiyar J. at p.100.

14. Das J. at p.97 col.2 "This power must inevitably result in discrimination ...(which is) incorporated in this part of the section itself".

15. A.I.R. 1952 S.C.123

with the requirements they laid down in the earlier case. But Mukerjea and Ali JJ. validated it on the ground that unlike the Bengal statute the object of this statute was not to provide for "speedier trials" but "to provide for public safety, the maintenance of public order and the preservation of peace and tranquility in the State".[16] The other judges considered the statute to fall within the reasoning of the Bengal case.[17]

Jurists are divided whether Kathi Ranning's case overruled Anwar Ali's[18] and it does seem a little strange that the Court should emphasise so greatly the differences in the objects of the statutes impugned in the two cases. It must however be accepted that the Court had come to realise that it could not in fact apply the Common Law attitude against excessive delegation to reduce the Government's powers in statutes connected with public order. This is further reinforced by the fact that in later cases the Court approved of similar statutes even thought their object was to provide for "speedier trials for certain offences."[19]

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16. Fazl Ali J. at p.128; Mukerjea J. at pr.35 p.132-3.

17. Mahajan J. at pr.23 p.129; N.C.Aiyar J. at pr.51 p.137.; Bose J. at pr.57 p.138.

18. The following think that Anwar Ali was in fact overruled : Alladi K.Aiyar: The Court and fundamental rights (1955) 36; M.P.Jain: Administrative discretion and fundamental rights (1959) 1 J.I.L.I. 223 at 245; J.K.Mittal: Special Criminal Courts and the Supreme Court of India (1965) 9 J.I.L.I. 46 at 63-4; says it was not citing in support W.Douglas: From Marshall to Mukerjea (1956 T.L.L.) 311. Mittal's main argument appears to be based on the fact that the Objects of the Statutes were different. This ignores the rule that the Preamble to a Statute is after all only an extrinsic aid to interpretation. See G.P.Singh: Principles of Statutory Interpretation (1966) 78-85 and Supreme Court rulings cited there.

19. Kedar Nath v W.B. A.I.R. 1953 404 (Shastri J. for the majority, Bose J. in dissent); Kangshari Haldar v W.B. A.I.R. 1960 S.C. 457 (but note the dissent of Sarkar J. for Subba Rao J. and himself); Gopi Chand v Delhi Adm. A.I.R. 1959 S.C. 609 (per Gajendragadkar J.).

M. C. Setalvad in his Kashinath Trimbak Telang Lectures[20] on the Indian Constitution considers it anomalous that the Court did not apply the test of reasonableness in Article 19 (6) to preventive detention cases but did apply the test in cases in which an externment order had been passed against the petitioner, even though such orders also deprive a petitioner of his liberty in the same way.[21] But if we look at the cases themselves we will see that the Court in fact approved of the powers of externment in all but one of the cases brought before it.[22] In the remaining case[23] the Court invalidated S.4 and 4A of the C. P. and Berar Goondas Act, because they gave a wide uncanalised power to the executive.

It thus appears that the Court seems to have approved generally of public order statutes and the only reservation it appears to have made is on grounds of administrative law viz. that the powers given must not be too widely expressed.

This "pro-Government" stand is continued in procedural matters. Article 22 (1 and 2) of the Constitution lays down that if a person is arrested he has a right to be informed as soon as may be of the grounds

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20. The Indian Constitution (1967) pp 528-9; on externments orders generally see a contributed article in 11 J.I.D.I. 1-28.

21. There is however a difference between being deprived of one's liberty totally (which comes under Article 21) and merely losing one's freedom of movement which is specifically covered by Article 19(1)(d).There is therefore textual justification for the Court taking the view that it did.

22. See N.B.Khare v Delhi A.I.R. 1950 S.C. 211; Gurbachan Singh v Bombay A.I.R. 1952 S.C. 221; Hari Khemu Gawali v Dty Commr. A.I.R. 1956 S.C.559 (but note the dissent of Jaganadhdas J.); Bhagubha Dullabhai v D.M.Thana A.I.R. 1956 S.C. 585 (see pr.17 p.592). See also the comments of U.P. v Kaushailya A.I.R. 1964 S.C. 416 (on the externment of prostitutes); Seervai (1967) 349-51.

23. M.P. v Baldeo Prashad A.I.R. 1961 S.C. 293. The Act allowed the externment of "goondas" but failed to define what a "goonda" was.

of his detention and consult a legal practitioner of his choice (Article 22 (1)), and be taken within 24 hours to a Magistrate, without whose consent he cannot be further detained (Article 22 (2)). The Supreme Court was at first reluctant to give a wide interpretation to these procedural provisions. Thus in Punjab v Ajaib Singh[24] the Court held that a detention under the Abducted Persons (Recovery and Restoration) Act 1949 was not an arrest within the meaning of Article 22 (1) which does not define arrest and therefore leaves the matter within the discretion of the Court. This was followed in Purshottam v B.M.Desai[25] with respect to arrests under the Bombay Land Revenue Act 1876 and in Collector of Malabar v Ebraim[26] for arrests under the Madras Recovery of Revenue Act (2 of) 1864. Again in M. S. M. Sharma v Sri Krishna Sharma[27] the Court ruled that Article 22 (1 and 2) did not apply to arrests for contempt of Parliament. But this case was dissented from in an Advisory Opinion in 1965.[28] In Ram Sarup v Union[29] the Court held that the right to counsel did not include the right to see relatives through whom counsel could be obtained. It appears therefore that the Court interpreted the provisions of the Constitution so as not to give them or the petitioner an extra leverage to question the powers of the Government.

More recently, however, the Court has softened its attitude,

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24. A.I.R. 1953 S.C. 10 The judgement was delivered by Das J. The same attitude was followed in Malaysia, Chiakhinsze v Mentri Besar, Selangor (1958) 24 Mal.L.Jnl. 105.

25. A.I.R. 1956 S.C. 20 (per Das A.C.J.).

26. A.I.R. 1957 S.C. 688 (per Imam J.).

27. A.I.R. 1959 S.C. 395. This case overruled Ganpati v Nafisul Hasan A.I.R. 1954 S.C. 636 which Das J. (who delivered the judgement in this case) overruled because it proceeded on a concession.

28. Re. Article 143 A.I.R. 1965 S.C. 745.

29. A.I.R. 1965 S.C. 247.

and in M. P. v Shobharam[30] the Court ruled that a person could ask for legal counsel in an arrest under the M. P. Panchayat Act 1949. Hidayatullah J. (for the majority) quoted from old English sources to present a general policy for ensuring that procedural safeguards exist against any form of arrest. He took the view that any other view would be going back to the "middle ages".[31] The minority thought that the Act provided adequate procedural safeguards.[32] In Maharashtra v Prabhakar[33] the Court took the view that a detenu should not be denied the right to publish a book on the "Atom". The Court felt that arrest and detention did not mean the loss of all reights, and that the detenu could not for example be starved to death.[34]

In Re Madhu Limaye[35] Grover J. referred to the importance of procedure in other countries[36] and observed :

> "(T)hose who feel called upon to deprive other persons of their liberty in the discharge of what they consider to be their duty, must strictly and scrupulously follow the forms and rules of law."

Apart from the more recent attempt to extend the procedural requirements of Article 22 (1) and (2), it appears that the Court has not really made an effort to try to evolve a concept of reasonableness

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30. A.I.R. 1966 S.C. 1910.

31. See generally prs. 24-7 pp.1917 citing De Republica Angborum Bk.II c.23 quoted Holdsworth IX H.E.L. 225; Stephen: I History of the Criminal Law 325, 330-1; R. v Holmes (1964) 1 W.L.R. 576. Gideon v Wainwright (1963) 333 U.S. 463.

32. A.I.R. 1966 S.C. 1910 at pr.5 p.1913.

33. A.I.R. 1966 S.C. 424

34. Ibid at pr.8 pp.427-8.

35. A.I.R. 1969 S.C. 1014.

36. Ibid at pr.10-11 p.1018 referring to the Japanese Constitution Article 34, the American Constitution, the 6th Amendment, and the English case of Christie v Leachinsky (1947) 1 All.E.R. 567.

in relation to statutes related to public order, when pitted against the Constitutional provisions in Article 19 and Article 14. Instead until recently they have fallen back on English concepts of administrative law to ensure that a large amount of power is not delegated at all. The concept of distrust of power was made very popular in the late 1920's and the early 1930's when these issues were raised by Lord Hewart in his book The New Despotism and examined in detail by the Donoughmore Committee.[37] It is feasible that the Judges of the Supreme Court, then either students of law or young lawyers, were influenced by this development. This attempt to treat law and order problems as merely an exercise of administrative power, and losing sight of the purposes for which the statute was enacted is yet another instance where foreign techniques were followed in preference to an analysis of the typically Indian situation before them.

At the same time it must not be forgotten that some effort was made by Das and Shastri JJ. to ensure that a wider view of the issues was taken. But they too did not in fact go much beyond giving a liberal interpretation of the administrative law techniques before them rather than attempting to discover whether the Constitution gave any scope for discussing the matter from an indigenous point of view, whereby in applying the concept of reasonableness they could look at the Indian situation comparing Indian and British attitudes to problems of law and order, rather than merely question the desirability of the delegation of power.

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37. For a detailed analysis see Seervai: The position of the judiciary under the Constitution of India (1970) Chapter IV "The Supreme Court of India and the shadow of Dicey" p.78 ff.

5. The Supreme Court and Preventive Detention in India.

i . The Policy of Preventive Detention.

The Constitution empowers Parliament to make laws relating to preventive detention[1] and lays down the procedure that must be followed in such cases.[2] Under these provisions Parliament passed the Preventive

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1. These are provided in List I Entry 9 : "Preventive detention for reasons connected with defence, foreign affairs or the security of India; persons subjected to such detention." List III Entry 3 : "Preventive detention connected with the security of a State, the maintenance of public order or the maintenance of supplies and services essential to the community; persons subjected to detention "

2. These are contained in Articles 21 and 22 (4-7) which are reproduced below:
Article 21. Protection of life and personal liberty. No person shall be deprived of his liberty except according to procedure established by law.
Article 22. Protection against arrest and detention in certain cases. ...
(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless:-
(a) An advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a High Court, have reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention, provided that nothing in this clause shall ~~allow~~ authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (7), or
(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clause (a) and (b) of clause 7.
(5) When a person is detained in pursuance of an order under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against that order.
(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.
(7) Parliament may by law prescribe :-
(a) the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention, without obtaining the permission of the Advisory Board in accordance with the provisions of sub-clause (a) of clause (4).
(b) the maximum period for which a person may in any class or classes of cases be detained under any law providing for preventive detention.
(c) the procedure to be followed by the Advisory Board in an enquiry under sub-clause (a) of clause (4). ...

Detention Act 1950 as a short term measure. The Courts were taken in by the short term duration of the Preventive Detention Act and in S. Krishnan v Madras[3] the Supreme Court held valid S.11 (of the Act) which provided for detention beyond the period of three months without providing for the maximum mentioned in Article 22 (7) (b) of the Constitution. Again In Dattaraya v Bombay[4] the Court did not invalidate an order which did not provide for a maximum period of detention on the grounds that the Act was due to expire after a year. The same attitude was accepted in Shamrao v D. M.[5] But the statute soon became a permanent feature in the statute book.

Preventive detention has in the main been used to control normal public order offences, apart from the years 1950-1 when it was used to combat Communist activity in Telengana and Hyderabad and 1952 and 1957 when it was used to control large scale mass agitation in the Punjab. Nor can it be said that the Act has been used discriminatingly against Communists, who after 1951 ceased to account for a majority of the detentions under the Act. The extent of the operation of the Preventive Detention Act is shown in three tables (Tables I, II and III) below.

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3. A.I.R. 1951 S.C. 301; but note the dissent of Bose J. that specification of the maximum was necessary. In 1952 Parliament added S.11 A to the Act whereby a maximum of 12 months was specified.

4. A.I.R. 1952 S.C. 181 at pr.14 p.186; but note the dissenting opinion of Mahajan J. at pr.35 pp.191-2.

5. See the judgement of Bose J. A.I.R. 1952 S.C. 324 at pr.23 p.328. Note that Bose J. led the dissent questioning this approach in the case cited f.n. 3

TABLE I showing the number of detentions under the Act.

Date	Number of detenus	Special comments
1950	10,962	6,000 in Telengana (rebellious area)
1951	2,326	726 in Hyderabad (rebellious area)
1952	1,316	425 in P.E.P.S.U.
1953	736	
1954	325	
1955	325	
1956	200	
1957	292	101 in Punjab
1958	177	
1959	Figures not available	
1960	175	
1961	175	
1962	219	
1963	288	

TABLE II showing decline in numbers of Communists detained.

Date	Number of Communist detenus	Total number of detenus
1953 (till Sept)	112	126
1956	3	292
On Oct.31,1957	11	

TABLE III showing the kinds of activities for which detention was deemed necessary.

Date	1	2	3	4	5	6	7	8	9
Oct.1,1953 to Sept.30,1954	259				106	126	7	25	1
1954-5	325				106				
On Dec.31,1955	131	122							
1957 to Oct.1,1960	569	500	45	22					

Key to Table III

1 = total number detained

2 = for security of state and maintenance of public order

3 = maintenance of supplies essential to the community

4 = defence of India and relations with foreign states

5 = violent activities

6 = harbouring dacoits, goondaism, terrorism, inciting strikes

7 = espionage

8 = communal activities

9 = being a bad character

Source of all three Tables: D.H.Bayley: Preventive Detention in India (1962) Chapter II, supplemented by D. H. Bayley: The policy of preventive detention (1950-62) (1964) 10 Journal of Public Administration.

It will thus be clear that preventive detention has become a peace-time measure to solve peace-time law and order problems. The Act has concentrated on providing its own remedies rather than concentrate on judicial review. Advisory Boards which have to be consulted before a person can be detained for a period of three months have played a major role and set aside 28 per cent of the orders referred to them. Between the years 1952 and 1953 the Supreme Court upheld 74 and set aside 83 orders. But in this the Government itself played a greater role by suo motu revoking detention orders in 158 of the cases pending before the Court. By 1954-5 the Courts intervened in only 34 cases, among which the Supreme Court accounted for only one.[6] In the early years the Court was not expected to and did not play an important role. Gradually it seems to have accumulated powers of review of its own making, as we shall see later.

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6. D.Bayley: Preventive Detention in India (1962) Chapter II.

ii. The Supreme Court : Choice of Techniques.

The Supreme Court could follow three techniques in dealing with the law of preventive detention. Firstly, it could follow the American technique of imposing a broad pattern of review based on the concept of due process. The Court rejected this and preferred to respect the Constituent Assembly's taboo on the use of such techniques; but at the same time, in an effort to show that they were not out of tune with cosmopolitan ideas, first misrepresented and then discredited the American system as inadequate. Secondly, the Court could use the English administrative law techniques, whereby it could follow a policy of non-interference and concentrate on the third avenue open to them and stress that the Constitutional procedural requirements in Article 22 (5) and (6) are not violated. What the Court has done is extremely ingenious. It relied upon the Constitutional requirements (the grounds supplied to the detenue in Article 22 (5)) and then introduced a broad policy of review on the basis of the English administrative law doctrine of ultra vires in a manner which is totally inconsistent with English attitudes to the exercise of the powers of preventive detention which it professed to follow. In this way the Court has maintained the appearance of respecting the subjective satisfaction of the detaining authority but at the same time reviewing the exercise of such powers on broad grounds of review which were never deemed applicable in this area. The Judges of the Court have altered fundamentally the whole concept of preventive detention and the Court's powers in relation to it, even though they themselves firmly believed that they were merely following a self-denying policy of non-interference.

ii. a. Rejection of broad based American patterns of review.

The Supreme Court first considered the policy of preventive detention in Gopalan v Madras.[7] The majority rejected all attempts by counsel to accord to the Supreme Court a broad constitutional power of review to examine if the statute or the order passed under it was reasonable or whether it lays down a "proper procedure". The Court summarily rejected[8] an argument, based on the doctrine of colourable legislation (which had formed so important a part of their juristic techniques in protecting property rights), that they could enquire whether the Preventive Detention Act fulfilled the purposes laid down in the legislative lists.[9] Again, it was argued that the test of "reasonableness" in Article 19 should be applied to preventive detention cases because a detention is a restriction on the freedom of movement guaranteed in Article 19 (1) (d). The majority of the Court did not accept this argument and took the view that Article 19 deals with the freedom of a free man and that once a person had been detained under Articles 21 and 22, the test in Article 19 had no application.[10] The majority also refused to accept the construction that law in Article 21 meant "natural law" or that "procedure established by law" meant "due process". They thought that the former construction was not warranted by the text of the Constitution[11] and that "due process" was too vague a concept to merit incorporation into the Indian Constitution.[12]

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7. A.I.R. 1950 S.C. 27.

8. Kania C.J. at pr.22 p.41; Mukerjea J. at pr.165 p.91-2(even though he stresses preventive detention is a drastic measure); Mahajan J. at pr.140 p.84 col.2; Das J. at pr.244-5 pp.121-2. Fazl Ali J. does not use the argument either but mentions it in passing at p.62.

9. See f.n.1 infra.

10. See Kania C.J. at pr.12 p.37, pr.9 p.36; Shastri J. at pr.102 pp.69-70; Mahajan J. at pr.137 pp.82-3; Mukerjea J. at pr.171 pp.93; Das J. in summary pr.225 at 113-4. Note that Mahajan J. took the view that Art.22 was a code to itself and therefore took the view that arguments connecting Art.19 to 21 were not applicable to Art.22 in any case.

11. Kania C.J. at pr.18(a)p.39; Shastri J. at pr.107 p.71-2; Mukerjea J. at pr.193 p.102; Das J. at pr.228 p.114-5.

12. Kania C.J. at pp.37-9; Shastri J. at pr.110-111 pp72-3; Mukerjea J. at pp,98-102; Das J. at pp.114-8.

The reason for their lordships taking this view was that they wanted to follow the views of the Constituent Assembly without any fuss and without any reference to American concepts. This is borne out by the fact that after admitting that recourse to Constituent Assembly debates was not warranted by the rules of interpretation,[13] the majority referred to the views of the Drafting Committee to show that they tried to avoid incorporating "due process" in the area of arrest and detention.[14] Even Fazl Ali J., who adopted both the "due process" and the "reasonableness" construction, while protesting[15] against the majority's reference to the Drafting Committee's opinion, admitted that the Committee had tried to avoid American concepts.

The majority judgements may also have been motivated by the facts that the judges realised the need for preserving law and order, and that the Government must be given full powers to deal with the problems that a breakdown of law and order would create. Shastri J. for example talked of the need to check

> "an abuse of freedom by anti-social and subversive elements which might imperil the natural welfare of an infant republic." 17

But in trying to achieve the construction that they wanted, the majority gave a misleading picture of the American concept of "due

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13. Kania C.J. at p.39 col.1.; Shastri J. at pr.111-2 p.73; Mukerjea J. at pr.190 p.101.

14. Kania C.J. at pr.17 p.39 on the grounds that it was permissible to refer to them to resolve an ambiguity (referring to Craies: Statute Law (4d) 122; Maxwell: Interpretation of Statutes (9d) 28-9; Crawford: Statutory Construction (1940)Edn) 379) though it is submitted with respect that his lordship did not in fact show that an ambiguity existed. Shastri J. at pr.111 p.73; Mukerjea J. at pr.190 pp.101; Das J. at pr.209 p.107.

15. at pr. 68 p.57 col. 1.

16. At pr.58 pp.53-4.

17. At pr.119 p.76. See also the catalogue of offences in the list by Mahajan J. at pr.148 pp.87-88 and by Fazl Ali J. at pr.87 p.64-5.

process". The allegation that due process is vague is unjustified if we remember that "due process" is a "fact value" concept[18] like negligence, the content of which is determined by the specific situation it is applied to. Elasticity and varied application must not be confused with vagueness. While it is true that in 1950[19] the American Supreme Court had rejected the incorporation theory which gives due process a specific content by incorporating the provisions of the Bill of Rights, it cannot be shown that due process was at that time regarded as a vague concept.

In drawing their conclusion about "vagueness" the majority rely either upon secondary material,[20] or on cases which form a part of the incorporation controversy,[21] or cases on property rights.[22] "Due process" was in fact imported from the provisions of Magna Carta[23] and had come to mean a process which ensures a fair trial and an opportunity to be heard.[24] There is a long line of case law which shows that the American Supreme Court, even though not prepared to incorporate the Bill of Rights freedoms in the Fourteenth Amendment, used the due process concept to

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18. See J. Stone : Social Dimensions of Law and Justice (1964) 737.

19. See Adamson v California (1947) 332 U.S. 46. The incorporation theory was later accepted in Mapp v Ohio (1961) 367 U.S. 643.

20. e.g. Kania C.J. referring generally to Cooley & Willis (without making any quotations or making page references). In fact Willis (p.662) appears to accept that "due process" has a definite content.

21. e.g. Mukerjea J. referring to an isolated reference in Twining v New Jersey (1908) 211 U.S. 79 (a case on self discrimination), at pp.99 col.1.

22. e.g. Mukerjea J. referring to Lochner v N.Y. (1905) 198 U.S. 45 at p.100 col.1.

23. See Story: Constitution of the U.S. (1873 4d) pr.1789 pp.547; Mott: Due Process of law (1926)1-5; Hazeltine: The influence of the Magna Carta on American Constitutional Development (1917) 17 Yale Law Jnl.1.

24, This is made clear in the Corpus Juris Secundum Volume 16A S.569(4) pp.571-9. See also J.H.Wildman: The Supreme Court and fundamental rights - A problem of Judicial method (1970) 23 Vand L.Rev. 792.

ensure that a proper trial had in fact been granted.[25] The American Supreme Court had always in the past stressed the need to give a person an opportunity to be heard as regards decisions which affect them.[26] More recently, an eminent writer has shown how a large number of day to day decisions fulfil "the requirement of a trial type hearing".[27] In fact, Fazl Ali J. (the dissenting judge) quoting from Willis[28] was right in pointing out that due process had come to mean the following rights

> "(1) Notice, (2) opportunity to be heard, (3) an impartial tribunal and (4) (an) orderly course of procedure." 29

The majority could, instead of going into the problem of "due process", have followed Mahajan J.'s example (he quoted only one Indian case), and come to the same conclusion as he did, without showing their scholarship. What they did (if one may venture a witticism) was to demonstrate that they had not failed contemporary jurisprudence, but contemporary jurisprudence had failed them. It is for this reason that they find solace in the fact that during war in England, English Courts

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25. See Murray's Lessee v Hoboken Land and Improvement Co. (1856) 18 How. 272 (on distress warrant levies); Hurtado v California (1884) 110 U.S. 516 at 531-2 (not providing a grand jury did not violate due process); Moore v Dempsey (1923) 261 U.S. 86 (per Holmes J.)(a lynch law case); Powell v Alabama (1932) 287 U.S. 45 (on the right to counsel); Brown v Mississippi (1937) 297 U.S. 278 (coerced confessions); Palko v Connecticut (1937) 302 U.S. 319 (double jeopardy); De Jonge v Oregon (1937) 299 U.S. 353. The emphasis was on whether there was any injustice done or not. See also the obiter in Morgan v U.S. (1938) 304 U.S. 1 at 19 (obiter) and comment on the case (1939) 52 Har.L.Rev. 509-515. See also Bodenheimer: Jurisprudence (1962) 299-300; Scwarz: Law and executive in Britain (1949) 216 (citing the first case cited in this note).

26. e.g. Londoner v Denver (1908) 210 U.S. 373 at 386; Bi-Metallic Inv. Co. v State Board ... (1915) 239 U.S. 441 at 445.

27. K.C.Davis: The requirement of trial type hearing (1956) 70 Har.L.Rev. 193-280. Though the essay is by no means based on concepts of due process.

28. Willis: Constitutional Law 662

29. See pp.58-60.

had sanctioned the detention of persons under a regulation which merely required the subjective satisfaction of the Home Secretary for an order to be made under it.[30] In England the power of judicial review was at its lowest ebb[31] and the Court simply adopted the position that existed in England. Like the English Courts, the majority were reluctant to apply the rules of natural justice to what they considered to be a purely administrative procedure. Fazl Ali J. alone appeared to want to introduce natural justice into the area, and he too preferred to rely on an old 1915 case[32] rather than the more recent decision of Franklin v Minister of Town and Country Planning (1948).[33]

The Court's technique consists of following the preference expressed in the Constituent Assembly, but at the same time referring to Anglo-American case law to show that they had not abdicated their responsibilities in the light of universal experience. This [illegible], may have prevented the Court from examining some of the real problems of preventive detention and the role that the Court ought to play. In fact 22 years later, the Court has still not clearly laid down its role (see below) even though it has assumed considerable powers of review despite its claim of maintaining a policy of non-interference.

The advent of Subba Rao J. to the Supreme Court led to a reconsideration of the basic soundness of the Gopalan decision. In

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30. Liversidge v Anderson (1942) A.C. 206 cited Kania C.J. at pr.24 pp. 41-2; pr.27 pp.42-3; P.Shastri J. cited the First World War case of R v Halliday exparte Zadig (1917) A.C. 260 at pr.74 col.1, p.78 col.1; Mukerjea J. cites both R v Halliday and Liversidge v Anderson at pr.164 p.91-2.

31. On the right to a hearing see De Smith: Judicial review of administrative action (1968) The path of deviation pp.144-154.

32. Local Government Board v Arlidge (1915) A.C. 120.

33. (1948) A.C. 87.

Kochunni v Madras[34] Subba Rao J.pronounced that the majority in that case was willing to accept the dissenting view of Fazl Ali J. in Gopalan's case as correct. But when the matter came to be reconsidered in Kharak Singh v U. P.[35] Subba Rao J. found himself in a minority. But the learned judge was able eventually to overrule at least one part of Gopalan's case in Maharashtra v Prabhakar[36] where Subba Roa J. reading the judgement for a unanimous Court held that detention under the Defence of India Rules did not mean that the detenu lost all his rights under Article 19 and there was no reason why the detenu could not exercise his right to speech to publish a scientific work on the atom, which he had written while he was detained.

But this does away with only an extremely small part of the logic of the Gopalan ruling. Soon after the retirement of Subba Rao J., Shah J., who had supported his judgements in all the three cases referred to above, wrote the judgement in R. C. Cooper v Union[37] in which he made the following observation :

> "In our judgement the assumption in A. K. Gopalan's case... that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is an infringement of the individual's guaranteed rights, the object and form of State action alone need (to) be considered and the effect of the laws on fundamental rights of the individual ~~is~~ be ignored cannot be accepted as correct." 38

Sikri C.J. in an extrajudicial statement said that this observation in fact amounted to an overruling of Gopalan's case.[39] If this is so, the

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34. A.I.R. 1960 S.C. 1080 at pr.25 1093

35. A.I.R. 1963 S.C. 1295 per Ayyangar J. (for the majority) at pr.15 pp.1301. But note the dissent of Subba Rao J. (for Shah J. and himself) at pr.31 pp.1305-6.

36. A.I.R. 1966 S.C. 424 at pr.2 p.426; pr.7 p.427.

37. A.I.R. 1970 S.C. 564.

38. Ibid at pr.64 p.597. But note the dissent of Ray J. who saw no reason why Gopalan's case be overruled (at pp 620-1).

39. Talk at the Institute of Advanced Legal Studies, June 21,1971.

Court has taken a very daring step in overruling by a mere obiter dictum (unsupported by much discussion on the point) a case which has been accepted as correct since 1950.

The implications of this new development could be far-reaching[40] because the Court could insist that the concept of reasonableness which is found in Article 19 should be introduced in the area of preventive detention so that the Court can enquire whether a particular order is justified. If this happens, the Court will be forced to evolve Indian principles of review rather than following English principles of review or avoiding American concepts of due process.

Although more than two years have elapsed since the R. C. Cooper decision, no broad patterns of review have emerged following the overruling of Gopalan's case. In fact there has been only one reference to Article 19 by Sikri J. in Mohd. Sabir v J. and K. (1971)[41] where the Court merely used Article 19 to justify preventive detention. The Court observed :

> "The petitioner further submitted that the words security of state do not exist in the Constitution. We referred him to Article 19 (2) of the Constitution in that connection."

Whether any broad patterns of a "due process" nature will emerge or not is difficult to say. Years ago Shastri J. said that procedure established by law

> "may be taken to mean (...)'ordinary and well established criminal procedure'that is to say those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code which is the general law of criminal procedure in the country." 42

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40. As can be seen in the Pakistan case West Pakistan v Begum Agha Abdul Shorish Kashimiri P.L.D. 1962 S.C. 14, where the Pakistan Courts have assumed wide powers of review.

41. A.I.R. 1971 S.C. 1713.

42. Gopalan v Madras A.I.R. 1950 S.C. 27 at pr.116 p.74.

If the Court adopts such a construction, it will adopt a theory which will give to the Court wide powers of review and make redundant a large part of the theory which underlay the special provisions of Article 22.[43] The Court has however relied in the main on the rules of Statutory Interpretation and English administrative law techniques.

ii. b. The use of the English administrative law techniques.

Having rejected until recently all attempts to introduce concepts of reasonableness or due process into the area of preventive detention, the Courts have fallen back upon the administrative law to procure for itself fairly sizeable powers of review, while interpreting S. 3 of the Preventive Detention Act. S. 3 lays down :

"(1) The Central or ... State government may

(a) if satisfied with respect to any person that with a view to preventing him from acting in a manner prejudicial to

(i) the defence of India,the relations of India with foreign powers, the security of India, or

(ii) the security of State or the maintenance of public order; or

(iii) the maintenance of supplies essential to the community ...

...

it is necessary to do so, make an order directing that such person be detained."

The Supreme Court took the view that S. 3 grants a subjective discretion to the executive.[44] But at the same time it seems to have adopted by implication[45] Greene M.R.'s test in Associated Provincial

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43. See Das J. in Gopalan v Madras A.I.R. 1950 S.C. 27 at pr.236 p.118.

44. e. g. Gopalan v Madras A.I.R. 1950 S.C. 27 at pr.27 p.43 (per Kania C.J.); at pr.92 p.66 (per Fazl Ali J.) at pr.123 p.71 col.2. (per Shastri J.) at pr.140 p.84 (per Mahajan J.) at pr.203 p.105 col.2 (per Mukerjea J.).

45. The case has never been cited by the Supreme Court.

Picture Houses Ltd. v Wednesbury Corporation (hereafter the Wednesbury case),[46] that even though the Court cannot interfere with the discretion of the executive, the Court can still apply the broad ultra vires test and enquire whether the particular exercise of power falls within the four corners of the Act.[47] In fact the Court has gone one step further and suggested that an order which does not satisfy the broad ultra vires test is in fact a mala fide exercise of power.[48] This approach enables the Court to say that though the discretion is subjective, (i.e. the Court will not interfere with the executive's view that the fact that "X" beat up his wife was a reasonable ground for preventively detaining him in the interests of the maintenance of public order) the Court can interfere on the broad ground that the action taken cannot be reasonably connected with the purposes for which the statute was enacted (i.e. the fact that "X" was beating up his wife could not conceivably be connected with the maintenance of public order).[49] In this way the Court has gradually built up a theory of review. It is submitted with respect that the Supreme Court has in fact done away with the concept of subjective satisfaction altogether and regards S. 3 as giving a normal discretionary power rather than an exceptional power of subjective discretion, even though, unlike the Pakistan Supreme Court[50] it has not disapproved of Liversidge v Anderson.[51]

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46. (1947) 1 K.B. 223.

47. See Atma Ram v Bombay A.I.R. 1951 S.C. 157 at pr.5 p.160 col.2; Shibban Lal Saxena v U.P. A.I.R. 1954 S.C. 179 at pr.8 p.180-1.

48. See Rameshwa v D.M. A.I.R. 1964 S.C. 334 at pr.8 p.337 (per Gajendragadkar J.); P.Mukerjea v W.B. A.I.R. 1970 S.C. 852 at pr.7 p.855.

49. Instances of this will be cited infra.

50. Ghulam Dhilani v West Pakistan P.L.D. 1969 S.C. 373.

51. (1942) A.C. 206.

While it is true that the broad ultra vires test is applicable to cases of normal discretionary power,[52] it does not apply to areas where the satisfaction of the executive is accepted as subjective, where the only allegation that can be made is that the order is mala fide. Professor de Smith, discussing the subjective satisfaction cases, says :

> "The burden of establishing that the competent authority did not honestly believe its conduct was directed to the furtherance of any of the comprehensive purposes (of the statute) but was acting in pursuance of an ulterior motive would be impossible to discharge. And dicta to the effect that the regulations purporting to be made in virtue of similar powers had to be capable of being related to the prescribed purposes failed to give any substance to judicial review." 53

The reason for this was explained by Viscount Maugham in Liversidge v Anderson (the leading case on the subject):[54]

> "(T)he Secretary of State must in the first place believe that the person ... (did something objected to by the regulations).(55) Any one of the various circumstances (mentioned in the regulations) is sufficient to satisfy the first fact that the Secretary of State must believe and I do not doubt that a Court could investigate the question whether there were reasonable grounds for a reasonable man to believe some of those facts if they could be put before the Court. But then he must at the same time also believe something very different in its nature, namely that by

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52. The test was laid down by Greene M.R. also in Carltona Ltd. v Commr.... (1943) 2 All.E.R.560 (does it come within "the four corners of the Act"- Lord Radcliffe: Att.Gen. for Canada v Hallet & Carey Ltd. (1952) A.C.427 at 450 (is it "capable of being related to one of the prescribed purposes"). This test has been extensively used. On its use see generally D.G.T. Williams: (1968) A.S.C.L.158 at 165-7; (1969) A.S.C.L. 115 at 125-9; D.G.T.Williams and M.Mathews (1970) A.S.C.L. 92 at 98-9. See also Markose: Judicial control of administrative action (1956) 417-23; Indian Law Institution publication: Cases and Material on Administrative Law (1964) Vol.I, pp.637-697. For a good survey see M.Fazal: Judicial Review of administrative action (1969 O.U.P.) 40-43.

53. Judicial review of administrative action (1968 3d) 276 citing Att.Gen. for Canada v Hallet and Carey Ltd. (supra f.n.52) at 450; Ross Clunis v Papadopoullos (1958) 1 W.L.R. 549 at 559 (P.C.) c.f. Lipton Ltd. v Lord (1917) 2 K.B. 647 at 654.

54. (1942) A.C. 206 at 220-1. For favourable comments on the case see Holdsworth (1942) 58 L.Q.R. 1-3. See also Keeton (1942) 5 Mod.L.R. 162 -73; Allen: Law and order (2d) 333-342 (reprinted from Volume 59 L.Q.R.)

55. He cited the objectives of the regulation, which is similar to S.3 of the Preventive Detention Act cited above.

> reason of the first fact "it is necessary to exercise control over" the person in question. To my mind this is too clearly a matter of executive discretion (and) ... not subject to the control of a judge in a Court of law. If then the second requisite, as to the grounds on which the Secretary of State can make this order for detention, is left to his sole discretion without appeal to a Court of law, it necessarily follows that the same is true as to all the facts, which he has a reasonable cause to believe."

More recently in a similar case from Ireland, McEldowney v Forde (1970) two judges in the majority in the House of Lords stressed that the Court was in duty bound to accept the Minister's view even as to whether the impugned regulations would achieve the statutory objectives[56] while the remaining majority judge tried to show that a nexus between the regulations and the statute existed.[57] That this is implied by the subjective satisfaction test has been generally accepted. A jurist commenting on Liversidege v Anderson in the context of public corporations has observed :

> "Th(e) judgement of the majority might well preclude the judiciary from examining the capacity of the public corporation in relation to (its) ... general functions." 58

It is true that the emphasis is changing,[59] but as Professor de Smith has observed, wherever the formula of subjective satisfaction

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56. (1969) 3 W.L.R. 179; Hodson L.J. at 188; Guest L.J. at 192. See P.Sills: Case comment (1970) 33 Mod.L.R. 327 at 328-9. Williams & Mathews (1970) A.S.C.L. 92 lay emphasis on the dissenting view of Diplock L.J. But it should be remembered that this case did not involve an executive order, but delegated legislation, where the Court is entitled to apply the ultra vires test.

57. Ibid, Pearson J. at 198.

58. W. Friedman: The new public corporations and the law (1947) 10 Mod. L.Rev. 233, 377 at 381.

59. See Customs & Excise Commrs. v Cure & Deeley Ltd. (1962) 1 Q.B. 340; Webb v Min. of Housing and Local Govt. (1965) 1 W.L.R. 755; Padfield v Min. of Agriculture & Fisheries (1968) A.C. 997 (and comment thereon by Wade: 84 L.Q.R. 166; (1968) 31 Mod.L.R. 446 by J.F. Garner).

has been used

> "the emphasis has been laid on the amplitude of the discretionary power rather than on the need to relate it to the purposes of the Act." 60

The Supreme Court of India, however, has taken the view that it can apply the broad ultra vires test and thus eat into the subjective satisfaction rule which otherwise necessarily precludes judicial review. At first the Court was cautious and in Atma Ram v Bombay[61] merely suggested that they could enquire whether

> "the grounds on which the government was satisfied are such that a rational human being can consider connected in some manner with (the) objects which were to be prevented from being attained ..."

But at the same time the Court added :

> "As has been generally observed this is a subjective decision of the government and that cannot be substituted by an objective test in a court of law." 62

In Shibban Lal v U.P. (1954)[63] the Court again said by way of obiter dictum that the grounds must have

> "a rational probative value and are not extraneous to the scope or purpose of the legislative provision ... " 64

But in Sodhi Shamsher v P.E.P.S.U.[65] the Court set aside the detention order on the basis of the broad ultra vires test, and ruled that speeches

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60. De Smith: Statutory restriction of judicial review (1955) 18 Mod.L.R. 575 at 590 citing Min. of Agriculture & Fisheries v Price (1941) 2 K.B. 116 (directions in respect of land); Robinson v Min. of Town & Country Planning (1947) K.B. 702; Taylor v Brighton Corpn. (1947) K.B. 736 (order relating to Town Planning scheme); Swindon Corpn. v Pearce (1948) 2 All. E.R. 119. De Smith makes the same point in Judicial review of administrative action (1968) 272 read with f.n. 61.

61. A.I.R. 1951 S.C. 157.

62. Ibid at pr. 5 p.162 col.2.

63. A.I.R. 1954 S.C. 179. The case was decided on a concession that one of the grounds was outside the purview of the Act.

64. Ibid at pr.8 pp.180-1.

65. A.I.R. 1954 S.C. 276.

made by the detenu to the effect that the Chief Justice of the State was communally biased, were not related to the general purpose of the maintenance of law and order. B. K. Mukerjea J. observed :

> "The utmost that can be said is that the allegations in the pamphlets are calculated to undermine the confidence of the people in the proper administration of justice in the State. But it is too remote a thing to say, that the security of state or the maintenance of law and order in it would be endangered thereby.
>
> After all, we must judge facts by the ordinary standards of common sense and probability and it is no answer to say that strange and unexpected things sometimes happen in this world." 66

After this the Court considered for itself whether the broad ultra vires test should apply in three cases,[67] even though it did not declare the particular orders in question invalid for this reason except, in one case, where the argument proceeded on a concession by the Government, the Court ruled that the order was defective because it bore no relationship to the statutory purposes.[68]

In Rameshwar v D. M.[69] the Court set aside the order of a detenu who was served with a detention order after he had already been in jail for 21 days, on the grounds that since he had been in jail his detention could not have been connected with the purposes of the Act.[70]

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66. Ibid at pr. 5 p.277-8.

67. Dwarka Das v J.K. A.I.R. 1957 S.C. 164 at p.166 col.1; pr.5 p.168 (the smuggling of commodities not mentioned in the Essential Supplies ordinance of the State was not connected with the maintenance of supplies essential to the community - but the argument appears to have proceeded on a concession by the Government at p.161 col.1, last 8 lines); Naresh Chandra v W.B. A.I.R. 1959 S.C. 1335 at pr.14 p.1341 (instigations to violate the personal safety of the Prime Minister was connected with the maintenance of law and order); Jagan Nath v Union A.I.R. 1960 S.C. 625 at pr.12 p.628 (bringing the Governments of India and Jammu and Kashmir into contempt was connected with the security of India).

68. Dwarka Das v J.K. A.I.R. 1957 S.C. 164 (see comment supra f.n.67).

69. A.I.R. 1964 S.C. 334.

70. Ibid at pr.13 p.338-9.

It described as mala fide an order not satisfying the broad ultra vires test, which it defined as follows :

> " ... The grounds must rationally support the conclusion drawn against him by the detaining authority." 71

Again, in Rameshwar Lal v Bihar[72] the Court enquired for itself whether the alleged black marketing activities were in fact prejudicial to the maintenance of supplies to the community, and found that they were . But the most extensive use of the broad ultra vires test is to be found in Sushanta v W. B.[73] where the Court went into the grounds of several connected petitions and ruled that :

(a) nuisance and allegations of offences in the Indian Penal Code[74] threats of murder,[75] assault,[76] robbery,[77] burglary,[78] indecent behaviour towards women,[79] mischief,[80] removal of rice bags in a clandestine manner,[81] theft,[82] hindering an investigation,[83] running away from a police hospital,[84] and several other cases,[85]

were not connected with the maintenance of public order (although they may be relevant to the maintenance of law and order); and

(b) operating a husking machine without a licence,[86] was not connected with the maintenance of supplies essential to the community.

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71. Ibid at pr.8 p.337.
72. A.I.R. 1968 S.C. 1303 at pr.7 p.1306.
73. A.I.R. 1969 S.C. 1004.
74. Ibid at pr.8 p.1006-7; pr.10 p.1007; pr.49 p.1013.
75. Ibid at pr.12 p.1007.
76. Ibid at pr.14 p.1007; pr.15 p.1007; pr.27 p.1009.
77. Ibid at pr.17 p.1008.
78. Ibid at pr.18-19 p.1008; pr.37 pp.1011-2.
79. Ibid at pr.21 p.1008.
80. Ibid at pr.22 p.1009.
81. Ibid at pr.25 p.1009.
82. Ibid at pr.29 p1010; pr.39 p.1012 (theft of rice); pr.40 p.1012 (theft of overhead traction wire).
83. Ibid at p.30 p.1010.
84. Ibid at pr.41 p.1012.
85. Ibid at pr.50,51 p.1013.
86. Ibid at pr.35 p.1011.

This distinction between "public order" and "law and order" was based on two earlier decisions of the Court, which were not concerned with the Preventive Detention Act.[87]

But the Court seems to have adopted the test and thus acquired a tremendous say as to what kind of offences preventive detention could be made applicable.

But what is the difference between the two terms "law and order" and "public order" ? In P. Mukerjea v W. B.[88] Ramaswami J., relying on the observations of an eminent English jurist,[89] felt that the difference was similar to the difference between private and public crimes in England. But more recently in Arun Ghosh v W. B.[90] Hidayatullah J., setting aside this distinction,[91] made the following observations :

> "Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing general disturbance of public tranquillity. It is the degree of disturbance and its effect on the life of a community in a locality which determines whether the disturbance amounts only to a breach of law and order ... The question to ask is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of public order or does it affect merely an individual leaving the tranquillity of the society undisturbed. This question is to be faced on facts. There is no case in which one case can be distinguished from another." 92

The learned judge then explained that a man forcibly kissing a "chamber maid" (his phrase) in a hotel may not disturb public order, but doing

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87. Supdt. Central Jail v R.M.Lohia A.I.R. 1960 S.C. 633 at pr.12 pp.639-40 (on Section 3 of the U.P.Special Power Act 1932); R.M.Lohia v State A.I.R. 1966 S.C. 740 (a case of detention under the Defence of India Rules 1962. But here there was a technical defect in the order i.e. the order instead of using the words "public order" used the words "law and order". (Note the dissent of Dayal J.)

88. A.I.R. 1970 S.C. 852 at pr.9.

89. C. K. Allen : Legal duties (1931 Oxford).

90; A.I.R. 1970 S.C. 1228.

91. Ibid at pr.3 p1230

92. Ibid at pr.3 pp.1229-30.

the same in the street might be a menace to working women and school girls and therefore offend public order. We will see that the learned judge's superficial anglicisation contrasts with his basic Indianness.

In this the Court has invented another "fact value" concept, to acquire a substantive say in matters of preventive detention and to what kind of offences preventive detention will apply, although they still pay lip service to the rule of subjective satisfaction which purports to oust their power of review.[93]

The Court has used this "public order" test in particular[94] and the broad ultra vires test in general[95] on several occasions and this promises to be an accepted part of the Court's techniques in controlling the Government's powers. The Court has justified its intrusion on the basis of notions of liberty. As Hegde J. put it in Sudhir Kumar v Police Commr.[96]:

> "The freedom of the individual is of utmost importance in any civilized society. It is a human right. Under our Constitution it is a guaranteed right. It can be deprived only by due process of law. The power to detain is an exceptional power to be used under exceptional circumstances. It is wrong to consider the same as the executive appears to have done as a convenient substitute for the ordinary process of law."

Thus we can see that although the Court had given the appearance of not interfering with matters of preventive detention in fact they have gradually acquired the techniques to interfere with almost every detention order on the basis of the broad ultra vires test, which has been

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93. P.Mukerjea v W.B. A.I.R. 1970 S.C. 852 at pr.8 pp.857-8 (assault on private individuals is not connected with public order); Shyamlal v Commr. A.I.R. 1970 S.C. 269 at pr.10 p.1072 (causing a riot in a tense area was connected with the maintenance of public order); Sudhir Kumar v Police Commr. A.I.R. 1970 S.C. 814 (causing a disturbance by knifing people was not connected with the maintenance of public order).

94. Bhrigunath v Orissa AII.R. 1970 S.C. 671 at pr.3 p.672 (stealing serviceable parts of railway equipment was connected with the maintenance of supplies essential to the service of the community.

95. See supra generally.

96. A.I.R. 1970 S.C. 814 at pr.7 p.815 (emphasis mine).

interpreted by the Supreme Court as not being totally excluded by the rule that the Court shall not reconsider the subjective satisfaction of the detaining authority. What has happened, in effect, is that the Court has rejected the broad powers of review as afforded by American due process techniques, but acquired virtually the same powers of review as those afforded by the American techniques by using the broad ultra vires test and English administrative law techniques. Moreover, it has interpreted these English law techniques to give them wide powers of review while retaining the theoretical stance of non-interference.

The concept of "mala fide".

The Supreme Court has also given a wide meaning to the concept of a mala fide exercise of power. "Mala fide" strictly speaking means "imputation of bad faith".[97] While it is true that in English administrative law the term has been "applied to almost any abuse of power"[98] it is applied in areas of "subjective satisfaction" in the former rather than in the latter sense. As Professor de Smith has observed :

> "Because of the difficulty of proving bad faith, it must be conceded that where such a 'subjective' discretionary power is vested in a Minister of the Crown, the reservation for the case of bad faith is hardly more than a formality ." 99

But the Supreme Court of India appears to have taken a different view of the matter. Accusations of bad faith are more readily made and

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97. See Lord Somervell in Smith v East Elloe Rural District Council (1956) A.C. 736 quoted Wade: Administrative Law (1968) 75; see also de Smith: Judicial review of administrative action (1968) 315-6.

98. See Wade (supra f.n.97) 75-6; de Smith (supra f.n.97) 315-6; see generally 301 ff.

99. de Smith (ibid) 315-6.

entertained in India. As early as 1950 in Ashutosh Lahiri v Delhi[100] the minority (Mukerjea and Mahajan JJ.) took the view

> "there can be no better proof of 'mala fide' on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which the ordinary law is quite sufficient." 101

This wide view was partly accepted by the majority, who made an effort to make "mala fide" mean both "imputation of bad faith" (a narrow concept) as well as an "abuse of discretionary power" (a wide concept). Kania C.J. (for the majority) observed :

> "The recourse to the drastic order for detention rather than a preventive order under Section 144 of the Criminal Procedure Code lends some colour to the petitioner's contention. Suspicion, however, is not enough and I am not convinced that the act of the District Magistrate was actuated by any improper or indirect motive." 102

But this broad view was soon abandoned in favour of the narrow view and in Tarapada De v W. B.[103] the Court held that the detention of a large number of detenus overnight did not disclose bad faith (in the narrow sense). In Ujagir Singh v Punjab[104] the Court held that a fresh order of detention on someone who had already been detained was no proof of mala fide. Finally, in Thakur Prashad Barua v Bihar[105] the Court impliedly[106] set aside any possibilities of review on on the

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100. Reported 3 years late in A.I.R. 1953 S.C. 451, but it was referred to earlier in A.I.R. 1952 S.C. 270 at pr.3 p.277 in another context.

101. Ibid at pr.8 p.452-3.

102. Ibid at pr.4 p.452.

103. A.I.R. 1951 S.C. 174 at pr.11 p.177.

104. A.I.R. 1952 S.C. 350 at pr.8 p.352.

105. A.I.R. 1955 S.C. 631 at pp.631 col.2.

106. Ashutosh Lahiri's case (supra f.n. 100) was not cited by the Court. One reason why the view expressed in that case did not attract support can be the fact that the case was reported late with the result that the Court did not really get a chance to re-examine it, since the chances of it being referred to them is considerably lessened.

basis of Ashutosh Lahiri's case, by ruling that even if the grounds of detention were the same as those of a criminal prosecution, the allegation of mala fide was not made out.

It has generally been assumed that this narrow view of ~~ultra vires~~ mala fide has been accepted by the Court.[107] But in Rameshwar v D. M.[108] Gajendragadkar J. made the following observation :

> "It is however necessary to emphasise in this connection that though the satisfaction of the detaining authority ... is subjective ... cases may arise where the detenue may challenge the validity of his detention on the ground of mala fides and in support of the said plea urge that along with other facts which show mala fides, the Court may also consider his grievance that the grounds served on him cannot possibly or rationally support the conclusion drawn against him by the detaining authority. It is only in this incidental manner and in support of a plea of mala fides that this question can become justiciable; otherwise the reasonableness or propriety of the said satisfaction ... cannot be questioned."

Identical remarks were made by Ramaswami J. 6 years later in P. Mukerjea v W. B.[109] and a broad view of mala fides seems to have taken root, although more recently Sikri C.J. made an attempt to put forward a narrow view, his comments can be limited to the facts of the case before him.[110]

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107. See : Seervai (1967) 453 ff.

108. A.I.R. 1964 S.C. 334 at pr.8 p.337.

109. A.I.R. 1970 S.C. 852 at pr.7 p.855 Here the remarks are identical but no reference is made on this point to earlier case law.

110. Mohd. Sabir v J.K. A.I.R. 1971 S.C. 1713 at pr.2 p.1715 col.1. "We cannot go into the merits, whether the facts stated in the affidavits are correct or not, but we can see that on the facts, no charge of mala fides can be made out." But it appears that in this case counsel tried only to prove that mala fides in the narrow sense existed and failed to do so, because it is very difficult to prove actual malice. But the Court appears to have accepted the broad interpretation of "mala fides". See Khagen Sarkar v W.B. A.I.R. 1971 S.C. 2051 at pr.8 p.2053.

It thus appears that the Court still appears to pay formal homage to the subjective satisfaction test but at the same time it has enlarged the meaning of mala fides so that it is synonymous with the broad ultra vires test.[111]

To conclude, we can see that although in theory the Court pretends to have limited powers of review and concern itself only with procedural requirements, in actual fact it has been able to get past the "subjective satisfaction" rule by making full use of the broad ultra vires test and interpreting mala fides as being nothing more that a simple excess of power.

We have already shown that the use of such techniques in the area of preventive detention is misconceived. The Court has made a deliberate attempt to acquire powers of review, without analysing the Indian context in which these powers were deemed necessary. It has laid down the broad rule that the power of preventive detention cannot be used to solve normal "law and order" problems, while ignoring the fact that preventive detention as a peace-time measure was designed to deal with just such situations. It has thus forced upon the Government the need to make a major policy decision without an adequate discussion, and has precluded the possibility of discussion by insisting that it is really enquiring into mala fides or an abuse of discretionary power. The extended use of English law techniques which stems from a broad desire to protect the individual and retain the power of review has been misused in a contest which has no parallel in England.

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111. For a strict and technically proper consideration of mala fides in this area : Aminah v Supdt. Prison, Kelantan (1968) I Mal.L.Jnl. 92.

ii. c. The use of the Constitutional text and the emphasis on Procedure.

The right to make a representation.

Article 22 (5) and (6) of the Constitution provide that a detenu has a right to be told of the grounds of his detention so as to enable him to make a representation (Article 22 (5)) unless the detaining authority does not consider it in the public interest to disclose certain facts.

The Court has used this provision to ensure that the right to representation is not defeated. But the Court has made clear that its powers of review do not extend to discussing whether the detention was justified but merely to see whether the grounds given are too "vague or irrelevant" to prevent any representation from being made at all. As N. C. Aiyar J. put it in Ujagir Singh v Punjab[112]

> " ... mere vagueness of grounds by itself without leading to an inference of mala fides or lack of good faith ... is not a justiciable issue in this Court ... "

But the Court has acquired a considerable power of review on the basis of the grounds supplied. In the first place it is these grounds which have enabled the Court to apply the broad ultra vires test as suggested above. Secondly, over the years it has begun to take a fairly wide view of what it considers "vague".

In the early unreported case of Ishwar Das v State[113] the Court emphasised that preventive detention was a very special law and that the detenu should be supplied with particulars about and not just grounds relating to detention.[114] But we know very little about this judgement except that the judgement was very brief,[115] and the matter

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112. A.I.R. 1952 S.C. 350 at pr.11 p.352.

113. Ptn. 30 of 1950 referred to in A.I.R. 1952 S.C. 30 at pr.11 p.353 col.1 and in Bombay v Atma Ram A.I.R. 1951 S.C. 157.

114. Das J. in Bombay v Atma Ram A.I.R. 1951 S.C. 157 at pr.41 p.174.

115. Shastri J. in A.I.R. 1951 S.C. 157 at pr.32 p.169. But note the observations of Das J. at pr.41 p.174 in the same case where he suggests that a lot of High Court case law was distinguished.

disposed of on a prima facie view.[116] In Ujagir Singh v State[117] the Court expressed the view that if Bombay v Atma Ram[118] had not been decided the court would have extremely wide powers of review on the basis of Ishwar Das's case.

The leading case on the subject is Bombay v Atma Ram, where the question was considered more fully. Kania C.J. (for the majority) took the limited view of the term "vague", which he defined as follows:

> "If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detenu to make a representation against the order of detention, it cannot be called vague." 119

Specific details were not deemed necessary, though Kania C.J. admitted that :

> "if the detenu was told about details of facts besides the grounds he will certainly be in a better position to put forward his representation." 120

In order to facilitate the administration's desire to be given time to convey material facts, the Court reversed the decision of Chagla C.J. in the Court below[121] and took the view that supplementary facts can be given to the detenu after the initial grounds have been given, if they do not amount to fresh grounds but merely lead to the same

> "inference of fact ... (as) the ground furnished in the first instance." 122

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116. See A.I.R. 1951 S.C. 157 at pr.32 p.169.

117. A.I.R. 1952 S.C. 350 at pr.11 p.352.

118. A.I.R. 1951 S.C. 157

119. Ibid at p.164 col.1.

120. Ibid at p.164 col.2.

121. A.I.R. 1951 S.C. 266 quoted in A.I.R. 1951 S.C. 157 at pp.159-60.

122 A.I.R. 1951 S.C. 157 at pr.15 p.164.

The minority went one step further. Shastri and Das JJ. in two separate judgements felt that the majority was inconsistent with the Court's view that the satisfaction of the Government was subjective,[123] and that it was not up to the Courts to insist upon the production of proper grounds as the Government could always refrain from disclosing them in the public interest.[124] The Court voted similarly in the companion case of Tarpada De v W: B.[125] but Shastri and Das JJ. abandoned their position of dissent in Ujagir Singh v Punjab[126] where they concurred in the order proposed by the majority.

After this the controversy shifted onto the contents of the details to be supplied to the detenu. In Ram Singh v Delhi[127] Shastri C.J. for the majority felt that giving the detenu grounds did not necessitate giving details of time and place, or even the gist of the offending passages of a speech.[128] He distinguished cases on pre-censorship of speech[129] as relevant only to Article 19 and not to preventive detention.[130] The minority (consisting of Mahajan and Bose JJ.) gave two separate judgements. Mahajan J. felt that details ought to be given in

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123. Shastri J. at p.166 (citing R v Halliday (1917) A.C. 260 at 269; Machindar Shivaji v K. (1949) F.C.R. 827 at 831,832) and at pr.27 p.168 (citing Liversidge v Anderson (1942) A.C. 206); Das J. at pr.36, p.171 (citing Machindar Sivaji v K. (1949)). An attitude similar though slightly more liberal than that of the minority has been followed in Karam Singh v Mentre Hal. Ehwal Dalam Negeri, Malaysia (1969) 2 Mal.L.Jnl. 129

124. Das J. at pp.172-3; Shastri J. at pr.26 pp.167-8. See generally pp.167-8.

125. A.I.R. 1951 S.C. 174.

126. A.I.R. 1952 S.C. 350 at 354.

127. A.I.R. 1951 S.C. 270.

128. Ibid at pr.9 p.273.

129. Romesh Thappar v Madras A.I.R. 1950 S.C. 124; Brij Bhushan v Delhi A.I.R. 1950 S.C. 129.

130. Ibid at p.272 citing Gopalan v Madras A.I.R. 1950 S.C. 27.

the same way as details are given for offences under S.124 A (sedition) and S.153 A under the Indian Penal Code 1860,[131] and Bose J. felt that details were necessary to ensure that the authority had not made a bona fide mistake.[132] He thought that though fundamental rights were not absolute the Court ought to remember that

> "in every case, it is the rights which are fundamental not the limitations and (that) it is the duty of this Court and of all Courts in the land to guard and defend these rights jealously." 133

What makes this case more important is the fact that as time went by, the Court gradually abandoned the majority position and began to emphasise the importance of supplying details. The majority view was however followed by two judgements by Jaganadhadas J. where he excused the lack of particulars by not "furnishing every meticulous detail"[134] on the grounds that in Thakur Prashad v Bihar[135] the Government was dealing with a tense communal situation, and in Lawrence D'Souza v Bombay[136] the appellant was suspected of espionage[137] even though in the latter case he admitted that the grounds were not as "specific as might be desired."[138]

But there is a line of authority which suggests that the Court can look to see if detailed information was in fact given. In Ujagir v Punjab[139] the Court held that allegations of motivating a strike and

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131. Ibid at pr.18 p.275 col.2.

132. Ibid at pr.31 p.277.

133. Ibid at pr.22 p.276. Note that Seervai (1967) 457 supports the minority view.

134. Thakur Prashad v Bihar A.I.R. 1955 S.C. 631 at pr.4 p.632.

135. Ibid at 632.

136. A.I.R. 1956 S.C. 531

137. Ibid at pr.4 p.535 (but note that the detenu had not asked for details).

138. Ibid at pr. 4 p.535 col.1.

139. A.I.R. 1952 S.C. 350.

being found with Communist literature were vague, although the Court appears to have been greatly influenced by the fact that there was considerable delay in providing the detenu with the grounds.[140] In Ram Krishnan v Delhi[141] Shastri (now) C.J., the author of the majority judgement in Ram Singh's case, held that details about private meetings and the fact that volunteers were being recruited for the petitioner's political party, without showing how the petitioner was personally implicated,[142] amounted to vague grounds,[143] and that since one of the grounds was vague the others could not support the detention because the subjective satisfaction of the executive may have depended on this vague ground rather than on the other valid ones.[144] The Court seems to have adopted, at least to some extent, the views of Bose J. in Ram Singh's case, when it observed :

> "Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously guarded ... by this Court." 145

After this the Court decided a number of cases where it examined for itself whether sufficient details existed, but did not interfere because the details given were sufficient.[146]

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140. Ibid at pr.13-4 pp.353 col.2.

141. A.I.R. 1953 S.C. 318.

142. Ibid at p.319 col.1.

143. Ibid at 320.

144. Ibid at p.320 col.1.

145. Ibid at pr.5 p.320 col.2.

146. S.V.Parulekar v D.M.,Thana A.I.R. 1957 S.C. 23 at 25 col.1 (details of dates and incidents were given); Naresh Chandra v W.B. A.I.R. 1960 S.C. 1337 at 1337-8 (details of time and place where speeches made were given. But the Court said (at pr.13 p.1341) that the Government could not be expected to give details of time and place about suspected future events); Jagannath v Union A.I.R. 1960 S.C. 625 at pr.626-7 read with pr.6 p.626. See also K.N.Joglekar v Commr. A.I.R. 1957 S.C. 28 at 33-4.

By 1968 the emphasis had changed and in Rameshwar Lal v Bihar[147] Hidayatullah J. (for a unanimous Court) held that the following grounds alleging smuggling, without providing details of time and place, were irrelevant:

> " ... (1) ... his trucks always take to wicked routes (sic) to ... (Place X) and he himself pilots them. (2) ... A businessman disclosed that he (the petitioner) ... visited Barihiya on several occasions and purchased gram and gram dal under various names and smuggled them into West Bengal." 148

Again in Motilal v Bihar[149] (a case of alleged black marketing) Hegde J. talked of

> "(t)he futility of making (a) representation against an unknown man in respect of an unspecified price." 150.

He added :

> "Individual liberty is a cherished right; one of the most valuable fundamental rights guaranteed by the Constitution ... We are not unaware of the fact that the interest of the society is no less important than that of the individual. Our Constitution (contains) ... provisions (which) harmonise the liberty of the individual with social interests. The authorities have to act solely on the basis of these provisions. They cannot deal with the liberty of the individual in a casual manner ... such an approach does not advance the social interest. Continued indifference to individual liberty is bound to erode the structure of our democratic society." 151

In Chaju Ram v J. K. (1971)[152] the petitioner was charged with conspiring with the leaders of the democratic conference to incite landless people to violence. Hidayatullah J. observed :

> "No details of the leaders of the Conference or of the persons incited or the dates on which he conspired or incited the squatters or the time and place when such conferences took place are mentioned. It would be impossible for anyone to make a representation on these grounds." 153.

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147. A.I.R. 1968 S.C. 1303.

148. Ibid at pr.8 p.1307 col.2.

149. A.I.R. 1968 S.C. 509.

150. Ibid at pr.6 p.508.

151. Ibid at pr.12 p.1513.

152. A.I.R. 1971 S.C. 263.

153. Ibid at pr.10 p.266.

In the recent case K. I. Singh v Manipur[154] the Supreme Court held that a delay of 17 days in supplying grounds was excessive.

In 1962 in Hari Kishan v Maharashtra[155] the Court also ruled that supplying a petitioner who does know English with grounds which are not in that language is not complying with the constitutional requirements, even though it was admitted that English was a national language.[156] This case has been generally followed.[157] But the Court has not allowed this to become a technical loophole and in Abdul Rehman v J. K.[158] the Court stressed that the detenu cannot demand the grounds in the vernacular, if he understands English. Again, the judgement in Bidya Deb v D. M.[159] seems to suggest that the onus of making a request is on the detenu.

We can see that the Court has used the Constitutional provisions to acquire a considerable say about the nature of the grounds supplied to the detenu, but in the main the real power of review comes from the broad ultra vires test rather than insistence on the Constitutional requirements.

The emphasis on procedure.

The Court has also played an important role in ensuring that the procedural requirements have been maintained. In the early years the Court allowed some latitude to the Government. It did not invalidate

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154. A.I.R. 1972 S.C. 439 at pr.19 p.443.

155. A.I.R. 1962 S.C. 911.

156. Ibid at pr.8 p.914.

157. Hadibandhu Das v D.M. A.I.R. 1969 S.C. 43 at 46-7; Chaju Ram v J.K. A.I.R. 1971 S.C. 263 at pr.9 p.265-6.

158. A.I.R. 1971 S.C. 266 at 267.

159. A.I.R. 1969 S.C. 323 at pr.21 pp.328-9.

a statutory section or an order because it did not lay down the maximum period of detention.[160] Nor did the Court create any problems about detention orders which might have lapsed between the expiry of one Act and the promulgation of another.[161] Again, in Bhim Singh v Punjab[162] the Court refused to invalidate an order because the District Magistrate had not formally stated that he was satisfied that he thought the order justified, or refer to the section of the statute. More recently the Court has taken a similar stand and not allowed the detenu to be let off on a mere technicality.[163] In Shyamlal v Commr.[164] the Court did not interfere where the Government had not dealt with the representation and hoped that it would,[165] even though the representation had been mislaid by the Government and was not traceable.

Nor did the Court interfere in Latif Hussain v J. K.[167] where the State Government confirmed the order of detention before the detenu was arrested. In Abdul Ghani v J. K.[168] the Court did not invalidate an order on the ground that the District Magistrate who passed the order did not state that the order be served on the detenu.[169] Nor has the

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160. See S.Krishnan v Madras A.I.R. 1951 S.C. 301; Dattraya v Bombay A.I.R. 1952 S.C. 181; Shamrao v D.M. A.I.R. 1952 S.C. 324.

161. Godavri v Bombay A.I.R. 1952 S.C. 52; Contrast Venkateshwarlu v Supdt. Central Jail A.I.R. 1953 S.C. 49.

162. A.I.R. 1951 S.C. 481 at 483-4.

163. See Barkat Ali v J.K. A.I.R. 1971 S.C. 217 (but the defect was remedied by a statutory provision).

164. A.I.R. 1970 S.C. 269.

165. Ibid at pp.271-2.

166. Ibid at pr.2 p.271. Note the comments of Ray J. on this in Jaynarayan v W.B. A.I.R. 1970 S.C. 675 at pr.14 p.677.

167. A.I.R. 1971 S.C. 122.

168. A.I.R. 1971 S.C. 1217.

169. Ibid at pr.4 p.1220.

Court questioned the reasons for which the detaining authority has witheld disclosure of grounds in the public interest,[170] except where the orders in this regard have not been passed within the specified time limit,[171] or a reasonable limit.

But the Court has interfered in matters which it has considered substantial. Thus in Makhan Singh v Punjab[173] the Court ruled that the detaining authority could not specify a maximum period of detention. Again in Bombay v Purshottam[174] the Court criticised the Government for the "slipshod verifications" in their affidavit which should have been modelled on Or.19 r. 3 of the Civil Procedure Code 1908. The Court has also not allowed the detenu to be punished for offences in jail.[175]

But three rights that the Court has secured must be pointed out. Firstly it ruled by a 4 : 1 decision in P. L. Lakhanpal v Union[176], in violence to the text of the Constitution,[177] that the Advisory Board must consider not just whether the detention before it should be continued beyond three months, but whether it is justified in the first

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170. Saifuddin Sood v J.K. A.I.R. 1971 S.C. 1529; Abdul Ghani v J.K. A.I.R. 1971 S.C. 1217; see also Bombay v Purshottam A.I.R. 1952 S.C. 317 at pr.19 p.319.

171. e.g. Fazal Hussain v J.K. A.I.R. 1970 S.C. 1870

172. See the judgement of the Court on the meaning of the words "as soon as may be" in Abdul Jabar v State A.I.R. 1957 S.C. 281. See also K.N. Joglekar v Commr. Police A.I.R. 1957 S.C. 28 and note the citing of irrelevant English case law on the meaning of the word "forthwith".

173. A.I.R. 1952 S.C. 27.

174. A.I.R. 1952 S.C. 317.

175. See Jagjit Singh v Punjab A.I.R. 1954 S.C. 325 from 330, 331-2.

176. A.I.R. 1958 S.C. 163.

177. Note the dissent of Sarkar J. which is supported by Seervai (1967) 452.
The text to cited supra p. 340 f.n. 2

place. In this it has superimposed on the Constitutional requirements a substantive quasi-judicial enquiry into the merits of the detention. Secondly, in a series of cases[178] it has ruled that the detenu has two rights of representation, one to the Advisory Board and another to the Government, and the latter cannot abandon the representation after receiving the report of the former and thus imposed on the Government the need to reconsider the decision. Thirdly, the Court has upset though not overruled a long line of authority of both the Federal Court[179] and the Supreme Court[180] by holding that the Government cannot make a fresh order of detention to substitute unless a fresh ground of detention exists.[181] In this way the Court has kept the Government on its toes by impliedly laying down that the authorities must not make a mistake the first time because they may not be given an opportunity to correct their error.

ii. d. Implications of the Court's choice of techniques.

The Court's use of techniques reflects on its ability to use and even distort English and American techniques to suit its own purposes. It rejected the American concepts for to accept them would be openly to defy the wishes of the Constituent Assembly. At the same time it readily complied with the English pattern of not interfering

178. Abdul Karim v W.B. A.I.R. 1969 S.C. 1028; Pankaj v W.B. A.I.R. 1970 S.C. 97; Jaynarayan v W.B. A.I.R. 1970 S.C. 675 at 677; Re Durga Show (1969) 2 S.C.W.R. 439.

179. Basanta v K. A.I.R. 1945 F.C. 18.

180. Note the early cases Naranjan Singh v Punjab A.I.R. 1952 S.C. 106 at pr.9-10 = 107-8; Ram Singh v Delhi A.I.R. 1951 S.C. 270 at pr.11 p.270. The cases of Rameshwar v D.M. A.I.R. 1964 S.C. 334 at pr.5 and Makhan Singh v Punjab A.I.R. 1964 S.C. 1120 at 1123 were interpreted in Godavari v Maharashtra A.I.R. 1964 S.C. 1228 to mean that an order of detention cannot be passed where the petitioner is imprisoned for having committed an offence or under trial for one.

181. Hadidbandhu v D.M. A.I.R. 1969 S.C. 43 at pr.7 p.47; Mohd. Shafi v J.K. A.I.R. 1970 S.C. 688 at pr.3 p.691 col.1; Kshetra Gogoi v Assam A.I.R. 1970 S.C. 1664 at pp.1666-7.

with the discretion of the Court when dealing with the issue of preventive detention. But having made all these concessions it has gradually amassed a tremendous power of review, the effect of which may well be that the Government cannot in future be able to detain preventively a person unless they can show to the Court that his detention is clearly associated with what the Court considers can be described as a threat to "public order". In achieving this result very little or no case law is quoted at all. The Court has merely relied on the techniques of English administrative law, which it is most familiar with. In effect it managed to secure a vital say in matters of preventive detention while retaining the façade of judicial restraint. But they have done this at the expense of distorting the English administrative law doctrines that they have used. Thus while the Court appears to pay lip service to the subjective satisfaction rule, it has taken the unusual step of simultaneously introducing the broad ultra vires test which as we have seen was not intended to be used in areas to which the subjective satisfaction rule applies. At the bottom of this lies the need of the Court to assert that neither the length of the Constitution, nor the fact that their jurisdiction has been specifically ousted from this area, will ~~not~~ prevent them from acquiring the power to question unreasonable decisions of the Government. The Court does not, like its American counterpart, wish to question openly the decisions of the Government for this would involve them in a major controversy which, given its still undetermined position in Indian society, might well undermine the prestige of the Court itself. But the Court has not by any means given up the quest to be an independent institution, which has the right to comment freely on governmental policy. ~~At present~~ Perhaps it has chosen to do this on the basis of ostensibly innocuous English law methods, until such time as it can, ~~out~~ come out in the open, make the same decisions on an independent basis.

There is a disadvantage in all this. The limited administrative law techniques preclude any real and substantive discussion of the issues involved. The Court cannot for example go into problems of administrative need, consider the problems of law and order or question the need to break official secrecy; all of which they would be forced to consider if they adopted a broader policy of review.

But it will be seen that this policy has developed gradually, covering many judges and many years. We therefore turn to the voting and judgement writing patterns (in these cases) which are tabulated in Tables appended at the end of this Chapter. Judges who took a different approach gradually abandoned it later. Thus Fazl Ali J. who wanted a broad American-type policy of review in Case 1 abandoned it later (Cases 2 and 3). Again Das and Shastri JJ. who had objected to the Court's acquiring a broad policy of review on the basis of Article 22 (5) of the Constitution, abandoned their dissent in later cases and Shastri J. actually wrote a judgement which in effect emphasised the need for more detail. Again Sinha C.J. who had concurred in an obiter demanding that Gopalan's case be overruled, wrote a majority judgement which affirmed it.

More recently a more consistent attitude has been followed. The use of the broad ultra vires test has been generally approved unanimously by the Court, though it owes its extended use to the judgements of Grover J., Ramaswami, Hegde and Hidayatulla JJ., the last of whom was able to sharpen more clearly the meaning of the term "public order". The judges seem to have operated on the premise that where the liberty of the individual is not be be trifled with, and they have taken it upon themselves to use their limited powers of review to reassess how the wide discretionary powers of the administration ought to be used. This can also be seen in their attitude to the exercise of powers of detention during the national emergency, to which we now turn.

6. The Supreme Court and Detention during the National Emergency (1962-8).

The Constitution empowers the President to declare an emergency.[1] As a result of the Chinese invasion the President declared such an emergency on the 26th October, 1962.[2] Such a declaration automatically suspends the limitations on State action in Article 19.[3] But the President also has the power to suspend the operation of such fundamental rights as he may specify.[4] The President suspended the operation of Articles 14,[5] 21 and 22,[6] and promulgated an Ordinance giving the Government powers of detention.[7]

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1. Article 352: "Proclamation of emergency (1) If the President is satisfied that a grave emergency exists whereby the security of India or a part of the territory thereof is threatened, whether by war or by external aggression, or internal disturbance, he may by proclamation, make a declaration to that effect." Contrary to the opinion of K. Subba Rao: Our Constitutional Problems (1970) 299-300 that the President has to act independent of the Cabinet, and that he must be satisfied that an emergency exists (see his judgements in Ghulam Sarwar v J.K. A.I.R. 1967 S.C. 1335), this power is virtually uncontrolled, apart from the Parliamentary control in Art. 352(2). In fact Professor P.K.Tripathi: Martial law in India A.I.R. 1963 Jnl. 67, has compared it with a state of martial law (he fails to gauge the importance of the fact that the jurisdiction of the Civil Courts has not been totally ousted). See also V.D.Sebastian: Emergency and Indemnity (1968) II S.C.J. 93; J.Minattur: Martial law in India, Pakistan and Ceylon (Hague 1963) and a review of it at A.I.R. 1963 Jnl. 10-11. I am also indebted to Mr. Chowdhry who is about to submit a Ph.D thesis to the London University on Martial law in Pakistan (1972) and Mr. J.Srivastava; who is also about to submit a Ph.D. dissertation to the London University on Emergency powers under the Indian Constitution (1972), for clarifying my ideas on the subject.

2. G.S.R. 1415 Gazette of India Oct.26 1962 Pt.11 S.3(1) Ext.p.544.

3. Article 358. On the scope of this Article see V.K.Thiruvenkaktachari: Scope of Article 358 (1966) I S.C.J. 1.

4. Article 359.

5. G.S.R. 1510 dated 11th November 1962.

6. G.S.R. 1464 dated 3rd November 1962.

7. Defence of India Ordinance 1962.

These powers have been extensively used though not without criticism.[8] Between 1962 (October 26) and 1964 (March 6) 1,323 persons were arrested out of which only 282 remained in custody.[9] Again, at the end of 1964 these powers were used to arrest an estimated 700 Communists in an attempt to quell a Communist uprising.[10] Further, these powers have also been used to solve law and order problems.[11]

The Court has once again managed to convey the impression that they do not wish to establish a system of judicial review but have managed to impose a fairly impressive control on the exercise of the power of detention. We will discuss the Court's techniques under the following heads :

i. Refusal to interfere on broad substantive grounds of review.

ii. Use of English administrative law techniques.

i. Refusal to interfere on broad substantive grounds of review.

In Mohan Chowdhry v Chief Commr.,[12] one of the first cases that came before the Court, it made it clear that it would not take it upon itself to question the validity of the Presidential order. B. P. Sinha C.J. observed :

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8. See generally Setalvad: Grave emergency and emergency arising out of the failure of the Constitutional machinery of a State (Sir A.K.Ayyar Lectures 1965). See also the editorial on this Hindustan Times Aug.20 1965; Setalvad: My Life (1971) 553-4; N.C.Chatterjee: Emergency Legislation and Fundamental Rights A.I.R. 1963 Jnl. 1; N.C.Chatterjee: Emergency Legislation and Fundamental Rights A.I.R. 1963 Jnl. 30; N.C.Chatterjee and P.Rao: Emergency and Law (1966 Calcutta) and the review A.I.R. 1967 Jnl. 80; V.Maya Krishnan: Emergency and Personal Liberty (1966) 8 J.I.L.I. 429. For an extremely well documented account of public opinion at the time see G.O.Koppel: The Emergency the Court and Indian Democracy (1966) 8 J.I.L.I. 287 (hereafter cited as Koppel (1966)).

9. See the Debate in the Lok Sabha (1964) 26 L.S.D. 4296 ff. See also Koppel (1966) 292.

10. See the Debate in the Lok Sabha (1965) 38 L.S.D. 489 ff. and also Koppel (1966) 293.

11. e.g. the Madras riots (1965) 39 L.S.D. 3462 ff. and also Koppel (1966) 293.

12. A.I.R. 1965 S.C. 173.

> "It was contended that the President ... is subject to the condition precedent that ... (it) is valid ... (and) it is open to the petitioner to canvass its validity ... This is arguing in a circle. In order that a Court may investigate the validity of a particular ordinance ... the person moving the Court should have locus standi ... (Under) the President's order the petitioner has lost his locus standi." 13

But Subba Rao J. who was party to the judgement in this case was not content and writing the majority judgement in Ghulam Sarwar v J. K.[14] ruled that the Court could examine whether a grave emergency justifying the necessity of promulgating the order also existed. He observed :

> "The expression 'grave emergency' in Article 352 (1) and the expression 'imminent danger' in Article 352 (3) show that the existence of a 'grave emergency' or 'imminent danger' is a precondition for the declaration of emergency ... " 15

But he added :

> "As the material facts are not before us, we shall not in this case express an opinion one way or another on this all too important question, which is at present agitating the public mind ... But there is the correlative danger of the abuse of such extraordinary power leading to t(o)talitarianism. Indeed the perversions of the ideal democratic constitution i.e. Weimar Constitution of Germany, brought about the autocratic rule of Hitler and the consequent disastrous World War." 16

The Court was also of the opinion that there was a difference between Constitutional provisions suspending fundamental rights and those giving a power to suspend fundamental rights. In the latter case, the Court could review the exercise of power and examine it under the provisions of the very rights which it purports to suspend.[17] His lordship then examined the order and ruled that the order with respect to foreigners was not invalid as violating the equality provisions of Article 14,[18] but it might be so if the order was "confined to an area or a period".[19] His Lordship justified this wide power of review on the basis of the need to protect fundamental liberty.

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13. Ibid at pr.8 p.177.
14. A.I.R. 1967 S.C. 1335.
15. Ibid pr.11 p.1338.
16. Ibid at 1338 [illegible].
17. Ibid pr.13 p.1339.
18. Ibid at [illegible] p.1339.
19. Ibid pr.14 p.1339.

> "Our Constitution seeks to usher in a welfare State where there is prosperity, equality, liberty and social justice. It accepts three concepts (1) Federalism, (2) Democracy, (3) Rule of law in which fundamental rights and social justice are inextricably integrated ... Part XVIII (on the emergency) appears to bring down the grand edifice of our Constitution at one stroke, but a little reflexion discloses that the temporary suspension of the scheme of our Constitution is really intended to preserve its substance ... " 20

Bachawat J., who wrote a separate judgement, agreed that the impugned order did not violate Article 14,[21] but added in obiter that to treat the Presidential proclamation just like any other law to be tested by the very fundamental rights which it suspends, was a "reductio ad absurdum" ... an "impossible conclusion".[22]

But this case was soon overruled in Mohd. Yaqub v J. K.[23] when it was considered by a differently constituted Bench (including Bachawat J. and Hidayatullah J. of the earlier Bench). In this case Wanchoo J. observed :

> "There is no scope ... for enquiring into the question whether the fundamental rights the enforcements of which the President has suspended under Article 359, has anything to do with the security of India which is threatened by war or external aggression or internal disturbance ...[24] (If) ... an order passed under Article 359 (1) suspending the enforcement of fundamental right has still to be tested under the very rights which it suspends ... (this) would, in our opinion, be arguing in a circle and make Article 359 completely nugatory." 25.

Hidayatullah J., who as we have seen once before had been misled into subscribing to a judgement[26] by Subba Rao J.

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20. Ibid at pr.11 p.1338.

21. Ibid at pr. 29 p.1342.

22. Ibid at p.1342.

23. A.I.R. 1968 S.C. 765.

24. Ibid at pr.6 p.768. See also pr.10 p.769-70.

25. Ibid at pr.9 p.769.

26. See Gujerat v Shantilal A.I.R. 1969 S.C. 634 at pr.1.

wrote a separate judgement in which he partly supported the earlier judgement where

> "(r)oom was, however, to be left for the play of Art. 14 for those theoretically possible (and fortunately only theoretically possible) cases in which the exercise of the power itself may be a cloak for discrimination, in other words cases of mala fide action and clear abuse of the power for some collateral purpose." 27

Explaining his assent to the earlier judgement his lordship said :

> "This strict reservation only was intended to go into the judgement in Ghulams Sarwar's case ... but if a wider meaning can be spelled out from that judgement I dissent from it and say that I never intended to be a party to such a wide statement. The examination under Article 14 of the suspension of the article itself, as expressed in the judgement of Subba Rao C.J., gives a very different impression. For the same reason I cannot subscribe to the width of language in the judgement just delivered which apparently does not make any reservation at all." 28

In Makhan Singh v Punjab[29] the Court also rejected the argument that though the Emergency Order had suspended the right to move the Court under Article 32 of the Constitution, the High Courts could still issue the writ of Habeas Corpus under the provisions of Section 491 of the Criminal Procedure Code 1898. It realised that the powers of detention were very wide, but it felt that the executive ought to be trusted[30] and that the answer was "ultimately to be found in the existence of enlightened, vigilant and vocal opinion."[31]

Once again we can see that the Court, apart from the brief interlude when Subba Rao J.'s judgements were accepted, refused to accept broad Constitutional powers and resorted to limited powers of review under the rules of English administrative law, emphasising procedure.

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27. A.I.R. 1968 S.C. 765 at p.771.

28. Ibid at pr.21 p.771.

29. A.I.R. 1964 S.C. 381.

30. Ibid at pr.46 p.403.

31. Ibid at pr.46 p.403-4.

ii. The use of English Administrative Law techniques.

(b). Making Judicial the review procedure.

The most important contribution that the Supreme Court has made is to make judicial the procedure for reviewing the detention of the petitioner. This first came up in Biren Datta v Chief Commr.[32] where the Court speaking through Gajendragadkar J. held that when a decision to confirm a detention is made it is

> "desirable ... fair and just that such detention decision should be communicated[33] ... (further) the appropriate authority should record its decision clearly and unambiguously. After all the liberty of the citizen is in question and ... the detention of the detenu is intended to be continued as a result of the decision."[34]

This attitude was confirmed in a later decision.[35]

But at about the same time the decision of Ridge v Baldwin[36] was decided in England, which overruled earlier case law on the subject, and ruled that the rules of natural justice[37] should apply increasingly to all decisions where the liberty of the subject is affected. In Sadhu Singh v Delhi Administration[38] counsel therefore argued that the rules of natural justice should also apply to the decision to review detention. Shah J. relied on two earlier English cases,[39] the rationale

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32. A.I.R. 1965 S.C. 596.

33. Ibid at pr.18 p.600.

34. Ibid at pr.14. See also pr.12 p.598 that the decision must be in writing.

35. Balmukund v D.M. A.I.R. 1965 S.C. 877 at pr.14 p.881. See also the reference to Biren Datta's case in Jaichand v W.B. A.I.R. 1967 S.C. 483.

36. (1964) A.C. 40. See case comments Wade: Administrative Law (1971)201-9.

37. These are that a person must be given an opportunity to be heard; and the adjudicating authority must not be biased. See de Smith: Judicial Review of Administrative Action (1967) Chap: 4 & 5.

38. A.I.R. 1966 S.C. 91

39. Nakkuda Ali v Jayaratne (1951) A.C. 66; Exparte Haynes (1928) 1 K.B. 171. He also relied on the earlier decision of the Supreme Court in Bombay v Khushaldas A.I.R. 1950 S.C. 222 at 226, 239, 250.

of which had been criticised in Ridge v Baldwin, ruled that natural justice should not apply and made the following observation :

> "I am not concerned with the validity of the criticism of Lord Reid of the two decisions. It is sufficient to state for the purpose of this case that there is no principle or binding authority in support of the view that, wherever a public authority is invested with power to make an order which prejudicially affects the rights of an individual, whatever may be the nature of the power exercised, whatever may be the procedure prescribed and whatever may be the nature of the authority conferred, the proceedings of the public authority must be regulated by the analogy of rules governing judicial determination." 40

But meanwhile the rules of natural justice were being applied on the basis of the Ridge v Baldwin decision in other areas,[41] and in P. L. Lakhanpal v Union,[42] leaving open the question whether Sadhu Singh's case should be overruled Shelat J. observed :

> "... it does not appear to have been argued that assuming the power to continue the detention was ministerial, the condition precedent to the exercise of that power was not the subjective satisfaction, but a decision from the facts and circumstances and that the validity of the exercise of that power is dependent on the existence of circumstances relevant to the purpose set out in (the rules)." 43

In a later case involving the same petitioner,[44] the Court overruled the earlier Sadhu Singh decision and held that the rules of natural justice do apply to the decision to review a detention. In arriving at this decision Shelat J. emphasised that the decision in this case became quasi judicial because it was arrived at on the evidence and the facts and that the Court could deduce the right to be heard by analogy from the provisions of Article 22 on Preventive Detention.[45] But the Court appears to have paid no attention to Shah J.'s

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40; A.I.R. 1966 S.C. 91 at pr.16 p.96.

41. See Associated Cement Companies Ltd. v P.M.Sharma A.I.R. 1965 S.C. 1595; Shri Bhagwan v Ram Chand A.I.R. 1965 S.C. 1767.

42. A.I.R. 1967 S.C. 908

43. A.I.R. 1967 S.C. 908 at pr. 9 p.913-4

44. P.L.Lakhanpal v Union A.I.R. 1967 S.C. 1509.

45. Ibid at 1512.

warning that the decision in detention was a special case and relied on case law, which concerned decisions of a totally different nature.[46] But the rule was applied and has been approved in later decisions of the Court.[47]

The decision to apply natural justice to detention law has been made as a result of changes in administrative law in England, giving the Court the power to examine the whole record. At the same time there was very little discussion on whether the decision was appropriate in this area. A rule of English law has been slipped in into what is a totally different situation in an attempt to make more judicial the administrative procedure of preventive detention and increase the Court's power of review.

(b) Subjective satisfaction and the emphasis on procedure.

The Court had accepted that the decision to detain in the first instance depended on the subjective satisfaction of the Government. In Makhan Singh v Punjab[48] the Court ruled that the only grounds on

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46. Board of Education v Rice (1911) A.C. 179 at 182 (concerning an education authority); Local Government Board v Arlidge (1915) A.C. 120 at 132 (a housing matter); Bombay v Khushaldas Advani A.I.R. 1950 S.C. 222 at 260 (land requisition matter); Nagendra Nath v Commrs. A.I.R. 1958 S.C. 398 (excise matter); Radhey Shyam v M.P. A.I.R. 1959 S.C. 107 (committee - a divided decision); Gullapalli Nageshwar Rao v A.P.R.S.T. A.I.R. 1959 S.C. 308 (a divided decision on road transport); Shivji v Union A.I.R. 1960 S.C. 600; Board of High School etc. v Ghanshyam A.IRR. 1962 S.C. 1110 (determining whether the respondent had used unfair means at an examination).

47. See Avtar Singh v J.K. A.I.R. 1967 S.C. 1797 (the Court would not allow the authorities to pass a fresh order of detention merely to evade the implications of the Supreme Court ruling); Jagdev Singh v J.K. A.I.R. 1968 S.C. 327 (where Avtar Singh's case was partly overruled and the Government given another opportunity to bring their review procedure in line with the Supreme Court ruling. This is obviously an instance of prospective overruling).

48. A.I.R. 1964 S.C. 381.

which the order to detain can be impugned were that there was excessive delegation in the making of the rules[49] or that the order was mala fide.[50] The Court therefore in Gopalan v Madras[51] stated that it would not assume that there was no satisfaction merely because 140 orders of detention were passed in one day. Again in Durgadass v Union[52] the Court refused to go into the question either that the Communist detenus were discriminated against or that this was a case of guilt by association.[53]

In Jaichand Lal v W. B.[54] Ramaswami J., relying on Federal Court and English cases,[55] held that there was nothing to prevent the executive from passing an order which merely recited the terms of the statute.[56] But at the same time the learned judge also tried to introduce the broad ultra vires test. In Durgadass v Union[57] Ramaswami J. said :

> "(I)t will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the legislature has in view ..."

This challenge came on the basis of the "mala fide" which he defined in Jaichand Lal v W. B.[58] as follows :

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49. Ibid at pr.36 p.400.

50; Ibid at pr.38 p.400. See also Anand v Chief Secy. A.I.R. 1966 S.C. 657 at pr.6-7 pp.660 (the Court did not also accept the plea of Parliamentary privilege).

51. A.I.R. 1966 S.C. 816.

52. A.I.R. 1966 S.C. 1078.

53. Ibid at pr.6 p.1080. See also Anand v Chief Secy. A.I.R. 1966 S.C. 657 at pr.26 p.666.

54. A.I.R. 1967 S.C. 483.

55. Relying on Liversidge v Anderson (1942) A.C. 206; K.E. v Shibnath Banerjee A.I.R. 1945 F.C. 156 at 161.

56. A.I.R. 1967 S.C. 483 at pr.8 p.486.

57. A.I.R. 1966 S.C. 1078 at pr.5 p.1080.

58. A.I.R. 1967 S.C. 483 at pr.5 p.485.

> "It may be stated in this context that mala fide exercise of power does not imply moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended ... In other words the power conferred by the statute has been utilised for some indirect purpose, the object of which is not connected with the object of the statute or the mischief that it intends to remedy."

But this broad ultra vires test was mentioned only by Ramaswami J.,[59] and did not become an important part of the techniques used by the Court in this area.

In the main the Court emphasised the importance of procedure. At first it gave the Government considerable leeway. In Godavari v Maharashtra[60] the Court distinguished two decisions on the Preventive Detention Act, and ruled that the Government could pass a fresh order of detention to detain a person who was already preventively detained. This had been followed[61] especially where the Government had to pass a fresh order of detention because a decision of the Court had necessitated the following of a totally new procedure.[62]

But at the same time the Court has insisted that the Government is dealing with the liberty of the subject and it must not be slipshod in sticking to the procedural requirements. Thus in Ajaib Singh v Gurcharan Singh[63] it set aside an order which had been passed not by a District Magistrate as required by the statute but by an officiating

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59. See supra p.[illegible]

60. A.I.R. 1964 S.C. 1128 distinguishing the cases of Rameshwar v D.M. A.I.R. 1964 S.C. 334 and Makham Singh v Punjab A.I.R. 1964 S.C. 1120 on the grounds that in those cases the detenu was under arrest as an under trial prisoner and not under preventive detention.

61. See Gopi Ram v Rajasthan A.I.R. 1967 S.C. 41 (where the order of detention was issued 7 days after his arrest for an offence under the Indian Penal Code 1860. The Court had some doubts about the authorities (see pr.9 p.243).

62. Jagdev Singh v J.K. A.I.R. 1968 S.C. 327 partly overruling the decision of Bhargave J. in Avtar Singh v J.K. A.I.R. 1967 S.C. 1767. Here the technical defect arose out of the Court decision in P.L.Lakhanpal v Union A.I.R. 1967 S.C. 1509 where the Court emphasised the need to follow the rules of natural justice while reviewing a detention.

63. A.I.R. 1965 S.C. 1619.

Additional District Magistrate. Again, in R. M. Lohia v Union[64] the Court invalidated an order which instead of using the words "public order" in the statute used the words "law and order". But here the long discussion on the difference of meaning between the two terms suggests an application of the broad ultra vires test. There is however the notable dissent of Dayal J. which suggests that the flaw was only of a technical nature and that the Court had itself made similar mistakes in the past.[65] The reason for this insistence on procedural matters was made clear in Jaganath v Orissa[66] where the Minister had made an inadequate affidavit. Wanchoo J., speaking for the Court, said:

> "Such discrepancy between the grounds mentioned in the affidavit and the grounds stated in the affidavit of the authority concerned can only show an amount of casualness in the passing of the order of detention ... This casualness also shows that the mind of the authority concerned was not really applied to the detention of the petitioner in the present case." 67

This theme of casualness was returned to by Gajendragadkar J. in Sadanandan v Kerala[68] where the detenu was locked up merely because the detaining authority thought he had kerosene oil without a licence (about which proceedings were under way). The Government affidavit in fact almost stated that the detention was to prevent the detenu from procuring a licence[69] His lordship criticised the casualness of the

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64. A.I.R. 1966 S.C. 740. This distinction later became very important to the application of the ultra vires test in matters of preventive detention.

65. Dayal J. quoting from Shibban Lal Saxana v U.P. A.I.R. 1954 S.C.179

66. A.I.R. 1966 S.C. 1140.

67. Ibid at pr.6 p.1142.

68. A.I.R. 1966 S.C. 1925.

69. Ibid at pr.18 p.1929.

authorities and observed :

> " ... we have yet to come across an affidavit which shows such an amount of casualness as (in) the present case." 70

He later then spelled out what the attitude of the Courts was :

> "(E)ven during an emergency the freedom of Indian citizens cannot be taken away without the existence of justifying necessity specified by the rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continued use of such unfettered powers may ultimately pose as a serious threat to the basic values on which the democratic way of life in this country is based." 71

It is clear that the Courts were beginning to become a little tired by the continued use of emergency powers and to use the broad ultra vires test. But fortunately the Government itself revoked the emergency.

The techniques used by the Court are once again similar to those that they used while approaching cases arising out of the law relating to preventive detention. After the efforts of Subba Rao J., who as we have seen preferred to follow the American pattern or broad powers of review, the Court had been very careful to retain the fiction of subjective satisfaction and rely on English administrative law techniques, making more judicial totally the procedure of review, emphasising the importance of procedure in matters of detail and making obiter statements, threatening to use the broad ultra vires test. Although the Court's claim to follow the attitude of the English Courts during the War it is clear that they have gone far beyond it and followed the more recent developments in English law (like in the case of Ridge v Baldwin[72]) without even examining the necessity of introducing such rules in the areas of preventive detention.

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70. Ibid at pr.18 p.1930.

71. Ibid at pr. 21 p.1930.

72. (1964) A.C. 40.

Table VI in the Appendix gives a summary of the voting and judgement writing patterns in the Court.

It will be seen that the major contribution in this area came from Gajendragadkar, Wanchoo and Shelat JJ. In was Gajendragadkar J. who first insisted in Case 5 that some kind of judicial pattern should be followed in the decision reviewing detention. Later Shelat J. in cases 19 and 21 overruled Shah J.'s decision in Case 8 and felt that the rules of natural justice ought to apply in this area. But setting aside old precedent Wanchoo J.,himself a judge from the Indian Civil Service, realised that the administration could not be expected to comply with the new natural justice requirements overnight and in Case 24 gave the Government an opportunity to pass new orders to re-adjust their procedures. Again it was Wanchoo J. who wrote the majority judgement in Case 23, in which the Court put an end to the efforts of Subba Rao J. to achieve a broad power of review. The other notable contribution came from Ramaswami J. who made an attempt to introduce the broad ultra vires test in Cases 13 and 18. These four judges account for 16 out of 25, or 80%, of the majority judgements delivered in these cases. Of the remaining 9 judgements, three were written by Shah, Subba Rao and Bhargava JJ, (Cases 8, 20 and 22 respectively) but were overruled by judgements of Shelat and Wanchoo JJ (in Cases 21, 23 and 24). The rest of the judgements do not make a significant contribution in enlarging the powers of review except the judgement in Case 11 where the Court appears to have relied upon a dubious distinction between "law and order" and "public order", which became an important part of the Court's jurisprudence in dealing with preventive detention cases. Very few separate and dissenting judgements were delivered in these cases. The most important in this regard were Case 11 (discussed above), the dissent of Subba Rao J. trying to retain a broad power of review in Case 2, and the dissent of Hidayatullah J. on the broad review

problem in Case 24. But apart from this the Court has voted unanimously, taking its cue from the leading judgement writers, to achieve an unobtrusive but nevertheless a very secure power of review, in this area.

7. Conclusion

The problem of law and order has been an area where Courts of law have chosen not to interfere with the discretion of the executive. This is even more true of the Indian tradition, which has not in the past justified a theory of revolt and in the days of British rule vast powers were given to the administration to deal with problems of law and order. The American Supreme Court had in the past assumed broad powers to review, but has used them sparingly.

The Indian Supreme Court has acquired considerable powers of review, but this has not been done on the basis of a broad Constitutional power of review. Instead it has followed the techniques afforded by English Administrative law and transplanted them without making any concession to what has always been regarded as the rather special problem of preventive detention. Indeed this position could have been arrived at even without the Constitution. The Court has used not its Constitutional powers, but merely its Constitutional position to acquire a say in matters of preventive detention without really going into the question whether the techniques that it has used are adequate to deal with the problems which Preventive Detention raises. Even in England (as we have seen) doubt has been expressed as to whether normal administrative law techniques of the type used by the Supreme Court can be used in such areas.

What the Court appears to have done is merely to assert its powers of review without evaluating how they ought to be used, although some attempt was made by Hidayatullah J. to define the meaning of law and order. By and large in an attempt to acquire an overall arbitral role, the Court has acquired vast powers. It is premature and impossible to predict how later judges will actually use these powers and relate them to India's problems.

The Supreme Court has treated the questions before it as simple problems of administrative law, rather than complicated and important problems of law and order.

Table No. IV - Cases on Preventive Detention 1950-64

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33
	50	51					52					53					54		55		56			57					58	59	60	62	64
	27	157	174	270	301	481	27	106	317	324	350	49	52	318	325	451	179	276	367	631	197	531	531	23	28	164	173	281	163	1335	625	911	334
Kania	*1	*1	*1	v	1	*										v																	
Fazl Ali	÷	1	1													v																	
Shastri	*2	*2	*2	*	*1		*	*	v	v	*3		v	v	v	v																	
Mahajan	*3		1	÷1	*2	v	v	v	v	v		*				v		v															
Mukherjea	*4	1	1				v	v	v	v			v	v	v	÷	*	*	v															
S. R. Das	*5	*3	*3	v	2		v	v	v	v	*2	v		v	v	*			v		v	v		v	v		*	*					
M. C. Ayyar		1	1			v	v	v			*1		v																				
Bose				÷2	÷				*	*			*						*														
Hasan													v	v	v																		
Bhagwati												v		*	*		v		v		v								v	v	v			
Jaganadhdas																		v	v	*	v	*				*							
T. L. V. Aiyar																						v		*	*		v	v				v	

Continued over

Table No IV - continued

	1 50	2 51	3	4	5	6	7 52	8	9	10	11	12 53	13	14	15	16	17 54	18	19 55	20	21 56	22	23	24 57	25	26	27	28	29 58	30 59	31 60	32 62	33 64
	27	157	174	270	301	481	27	106	317	324	350	49	52	318	325	451	179	276	367	631	197	531	531	23	28	164	173	281	163	1335	625	911	334
Sinha																					*	v		v	v	v	v	v		*	v	*	
Imam																					v	v				v			v	v	*		
S. K. Das																								v	v		v	v	*				
Menon																								v	v								
Kapur																													v	v			
Gajendragadkar																														v			*
Sarkar																													‡		v		
Subba Rao																																v	v
Wanchoo																														v	v		v
Hidayatullah																																	
Das Gupta																																	
Shah																															v		
Ayyangar																																v	v
Mudholkar																																v	v

Note: 52/350 Shastri and Das JJ. merely concurred in the order proposed

Table No. V - Cases on Preventive Detention - 1968-71

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27
	68		69					70											71								
	1303	1509	43	323	1004	1028	1153	97	269	671	675	688	814	852	1118	1228	1664	1870	62	122	217	263	266	337	1217	1713	152
Hidayatullah	*			*						*	*				v	*						*					
Das Gupta																											
Shah		v	*		v	v	*						v	v													
Dayal																											
Ayyangar																											
Mudholkar																											
Sikri		v							*									*			*		*		v	*	
Bachawat		v																									
Ramaswami			v		v	*	v							*													
Raju																											

Continued over

Table No V - continued

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27
	68		69					70											71								
	1303	1509	43	323	1004	1028	1153	97	269	671	675	688	814	852	1118	1228	1664	1870	62	122	217	263	266	337	1217	1713	1529
Shelat				v				*			v				v		v										
Bhargava			v	v				v				*			*		*						v		*		
Mitter		v		v					v						v			v			v						
Vaidialingam	v	v	v	v				v			v				v		v										v
Hegde		*						v	v			v	*					v									
Grover			v		*	v	v	v			v			v		v											
Ray										v	v					v						v					*
Reddy																											
Dua										v						v	v		*	*	v		v	v	*	v	v

Table No. VI - Cases under the Defence of India Act 1964 - 1964-68

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
	64				65			66								67							68	
	1773	3811	1120	1128	5596	8787	1619	91	3940	6567	7440	8166	1078	1140	1925	2441	2443	4883	9908	1335	1507	1797	3277	7665
Sinha	*	*1																						
Gajendragadkar			*	v	*				v	*		v	v	v	*									
Sarkar		v		v							*1					v	*							
Subba Rao	v	±	v				v												v	*				
Wanchoo		v	v	*	v		*		*	v		*	v	*	v			v					*	*
Hidayatullah		v			v		v		v	v	*2	v	v	v	v		v	v	v	v	v			±
Das Gupta		v		v	v																			
Shah	v	v	v				v	*	v						v									v
Dayal	v		v			*					±					v	v							
Ayyangar				v	v																			
Mudholkar	v					v					*3					*								

Continued over

Table No VI -continued

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
	64				65			66								67							68	
	173	381	1120	1128	596	877	1619	91	340	657	740	816	1078	1140	1925	241	243	483	908	1335	1507	1797	327	765
Mudholkar	v					v					*3					*								
Sikri						v	v		v						v			v	v	v				
Bachawat										v	2	v				v	v			‡			v	v
Ramaswami										v		v	*	v				*					v	v
Raju													v	v										
Shelat																v	v	v	*	v	*			
Bhargava																						*		
Mitter																			v		v		v	v
Vaidialingam																								
Hegde																							v	v

Key to Tables

v	=	concurring with majority judgement
*	=	majority judgement
*1 etc	=	majority judgements
1 etc	=	concurring with *1 etc
†	=	dissenting judgement
†1 etc	=	dissenting judgements

1. The Hindu Joint Family - an anachronism in modern times ?

In the past few years, a great deal of controversy has centred upon the capacity of the joint family to suit modern needs and adapt to an industrial age,[1] which favours and in some degree requires small families with commercial as well as geographic mobility, tending to depend on wages for their income. It is popularly believed that the size of the family unit is breaking down. This myth has been further perpetuated by the 1961 Census Report which states that the average size of a household in India is 5.20 persons.[2] To define the smaller one-degree family relationship as a household unit[3] is to ignore the existence of the joint family outside this unit altogether, and thus neglect the fact that the coparcenary is being replaced by an "extended" family[4] which

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1. The best discussion of this is that of M.F.Nimkoff: Is the joint family an obstacle to industrialisation (1959) 1 I.J.C.S. 109-118 (a comparative account analysing the effect of various levels of industrialisation on family life); See also M.Singer (in Singer & Cohen ed.) Structure and Change in Indian Society (1968 Chicago) 423 esp.424-427; P.D.Devanandan (ed.) The changing pattern of family in India (1960 Bangalore) - an unscholarly account published by the Christian Institute suggesting the Christian alternative); Aileen D. Ross: The Hindu Family in its urban setting (1961 Toronto) 18-27; Aileen D. Ross: Symposium on Caste and Joint Family : An Analysis (1955) IV Sociological Bulletin 85 at 96 where she puts forward the view that the joint family will be replaced by what she calles the "companionship family"; R.K.Mishra: Some questions regarding the Joint Hindu Family (in G.S.Sharma (ed) Property Relations in India (1968) Bombay) 240-260.

2. See Census of India (1961) Volume I : India Part II C (i) Social and Cultural Tables p.4.

3. See the criticism of the 1951 census by I.P.Desai: Symposium on Caste and Joint Family (1955) IV Sociological Bulletin 97 at 102-3.

4. See T.Madan: The Joint Family: a terminological classification (1962) 3 I.J.C.S. 7-16; See also the comments in his brief biographical note at (1962) 62 Man 145-6; H. Gould: Time dimension and structural change in an Indian Kinship System : A problem of conceptual refinement (in Singer & Cohen (ed) see f.n.1 supra) 413-421; F.G.Bayley: The Joint Family in India (1960) 12 Ec.Weekly 345-352; R.W.Nicolas: Economies of two family types in two West Bengal villages (1961) 13 Ec. Weekly Nos. 27-9; S.Shahani: The Joint Family - a case study (1961) 12 Ec. Weekly No. 49.

does not differ in spirit or form from the joint family.[5]

Within this "extended family" there exists enough cohesion to emphasise the jointness and yet at the same time enough flexibility to suit the needs of the business community.[6]

The joint family is treated as a static institution, because it is commonly believed that there are no intermediate states of jointness between absolute jointness and partition.[7] The question is : must members of the family, the able (coparceners) and the less able (non-coparceners), make a choice between a fictional complete jointness and also fictional complete severance ? The answer that they must[8] imposes too much fiction upon the facts. Courts, too, have tended to emphasise the legal state of jointness, rather than take note of the fact that families may remain joint in all other respects even though legally separate. Again, property acquired by all the coparceners jointly would not be treated as joint family property, if there was no

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5. Note the comment of I.P. Desai: (supra f.n.3) at 116 "On the whole, our opinion has been that the joint family is much more common both structurally and functionally than is supposed."

6. See B.R.Agarwala (himself of the business community) in Symposium on Caste and Joint Family (1955) 4 Sociological Bulletin 138 ff. But note at p.145 his fear that fiscal reform might destroy the joint family. On the fiscal aspect see also Derrett: Law and the predicament of the joint family (1960) 12 Eco. Weekly 305 col.1 and 2; R.L.S.I. (196) 419-20; C.M.H.L. (1970) 54, 148-50. See generally on the joint family in industry M. Singer :(in Singer & Cohen (ed) Structure and Change in Indian Society, Chicago, 1968) The Indian Joint Family in modern Industry 423-52 esp. 433-4 (Industrial leadership and the Joint family in the Madras City). Note, however, that the Privy Council placed great restrictions on the capacity of the Karta to open a new joint family business. See Benares Bank Ltd. v Hari Narain (1932) 59 I.A. 300; Sanyasi Charan v Krishnadhan (1922) 49 I.A. 108 (a Jayabhaga case). See also the dictum of the Supreme Court in Balmukand v Kamlawati (1965) 1 M.L.J. 6 (S.C.) at 9-10 where it is suggested that sons must be consulted before family property is parted with. See comment by Derrett (1965) 67 Bom. L. R. Jnl. 96-8.

7. See Maine : Ancient law (1891) 228; J.C.Ghosh: Our Joint Family Organisation (1881) Vol LXXIII Calcutta Review No. CXLVI pp.275-300; and other writers quoted in R.K.Mishra (supra f.n.1.) pp.245-6.

8. See the case of Approvier v Rama Subbayan (1866) 11 M.I.A. 75. See further Mayne (11d) 325; Derrett: I.M.H.L. (1963) p.317.

"nucleus" of joint family property, which formed the basis of the acquisition.[9]

Slowly, however, the law has come to recognise that there are ways in which members of a joint family can claim and exercise their individual rights without asking for a formal partition. Manu (VIII, 416) does not let the son even own his self-acquired property.

> "A wife, a son, and a slave can never acquire any property for themselves; whatever they earn go to him to whom they belong."

A text attributed to Vyāsa states that a father cannot alienate even his self-acquired property - if immoveable or bipeds - "without convening all his sons".[10]

In fact it is possible that where a coparcener dies joint, his (self acquired) property passed on to the other coparceners by survivorship, rather than to his heirs - a custom which seems to have lingered on amongst the Nambudri Brahmins of the West Coast.[11]

But the ancient texts came to accept that a person's self-acquired property was, for some purposes and to some extent, his. In the twelfth century, Vijñāneśvara argued that the son was in fact the owner of his father's self-acquired property, even though he could not

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9. This is the so-called "nucleus rule" stated in Lal Bahadur v Kanhaiya Lal (1906) 34 I.A. 65 (approved by the Supreme Court in Srinivasa v Narain A.I.R. 1954 S.C. 378 at pr.10 p.383; Mudigowda v Ramchandra A.I.R. 1969 S.C. 1076 at pr.6 p.1080. What we see here is a conclusive presumption (a legal fiction) employed by Vijñāneśvara subsequently allowed to get out of hand. For an up to date account see Derrett: Hindu Law: The Rights of the separated son (1956) S.C.J. Jnl. 103-111 who discusses the son's right in his father's self-acquired property in the light of modern decisions and the Hindu Succession Act 1956. Note: But there can be joint acquisitions without nucleus.

10. See Mit I.1.27.

11. Vasudevan v Secy. of State (1881) 11 Mad. 157 at 167.

restrict any alienations which the father might make.[12] On the other hand, the law gradually began to increase the varieties of self-acquired property.[13]

Anglo-Hindu law was responsible for preserving these distinctions and also adumbrating, without systematising, a large number of intermediate variations between partition and absolute jointness. Anglo-Hindu law was unable to escape from the textual dichotomy between a state of "indivision" (avibhaktatva) and a state of "separation", "division", "having divided" (vibhaktatva); but as the case law developed the rich variety of Hindu requirements obtruded itself.

These variations are illustrated in a diagram below.

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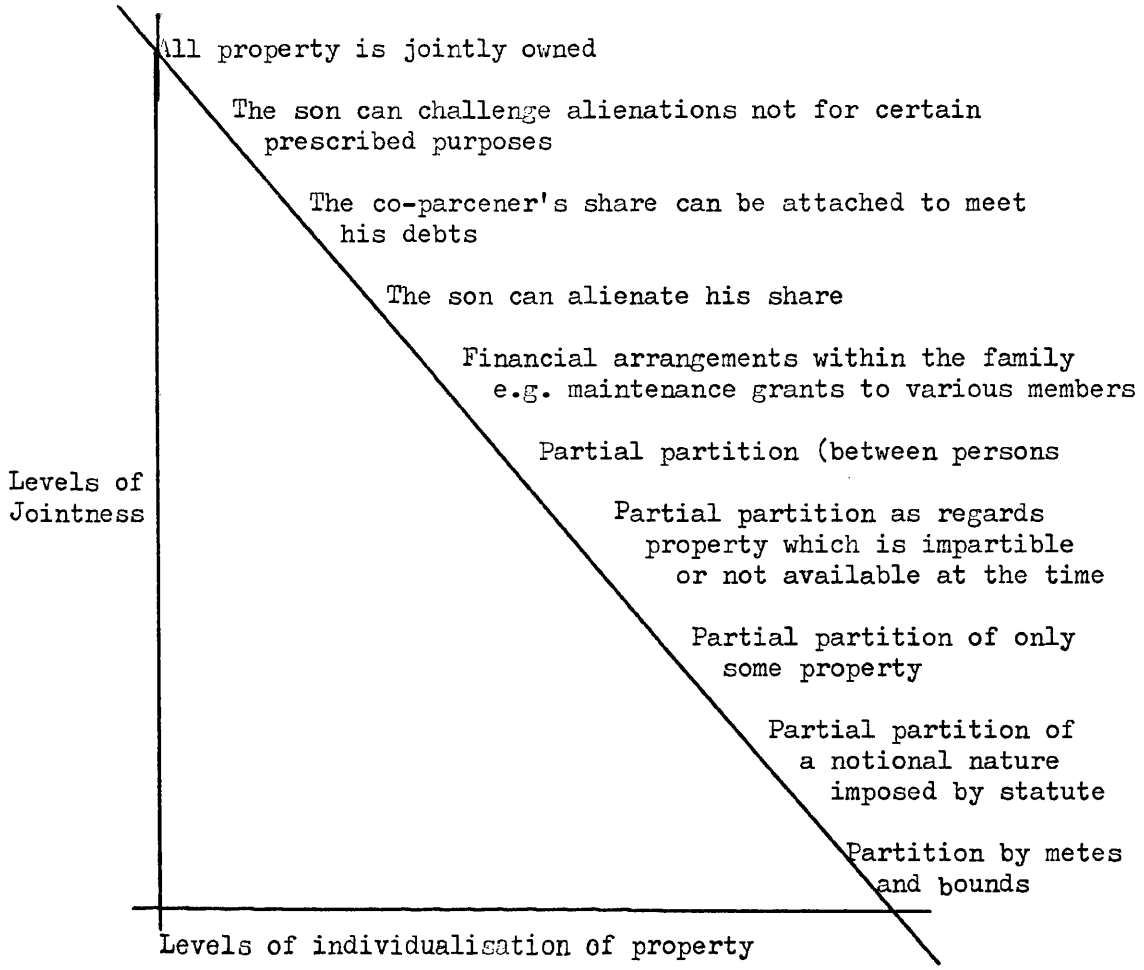
12. See Mit. I.iv.29. See on this P.Sen: Hindu Jurisprudence (1918) 130-133; G.D.Sontheimer: The concept of Daya: A comparative study (unpublished dissertation for a Post Graduate Diploma SOAS London (1962) Thesis No. 153. Institute of Advanced Legal Studies) 131-3. For an up to date account see Derrett: Hindu Law: The Rights of the separated son (1956) [illegible] 103-111, who discusses the son's right in his father's self-acquired property in the light of modern decisions and the Hindu Accession Act 1956.

13. For general accounts of the development of the joint family see G.D.Sontheimer: The Joint Family as a legal Institution (London Ph.D. dissertation (1965) Thesis 215, Institute of Advanced Legal Studies). This supersedes K.K.Bhattacharya: Joint Hindu Family (1884); R.C.Mitra: The joint family and partition (1913 Calcutta); for a brief account see N.C.Sen-Gupta: Evolution of Ancient Indian Law (1953 Calcutta) 202-226; B.N.Sarkath: The Hindu Joint Family: Retrospect and prospect (1967) 1 Ban.L.Jnl. 33 at 34-44; for a good modern account see Derrett: The history of the juridical framework of the joint family (1962) VI Contributions to Indian Sociology 19-47 reprinted with minor alterations in R.L.S.I. (1968) 400-436.



As time went on, the Courts in British India came to recognise the need to individualise the ownership of property within the family. In Rao Balwant Singh v Rani Kishori[14] the Privy Council held that the father could alienate his self-acquired immoveable property, without the consent of his sons.[15] Again, the Mitakshara lays down very clearly that the father cannot make, and consequently the sons can challenge, an alienation which is not for the benefit of the family, religious

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14. (1898) 25 I.A. 54, where it is argued that the consent of the son is a moral requirement not a legal one (at p.67). This is based on a misunderstanding of the traditional concept of ownership, which accords to the sone ownership in his father's self-acquired property. See further on this the references cited in f.n. 12 supra.

15. This ended a long controversy see Mayne (11d) 449-50 f.n. (e)(f).

purposes, or arising out of distress.[16] In the celebrated case of Hunumanpersaud v Mt. Babooee[17] the Privy Council accepted this limitation, but systematised on the basis of English law the principles to be applied in this area,[18] concentrating on the alienor's right to deal bona fide with the stranger-alienee.

A very important development came when it was held that a bona fide creditor of a co-parcener could enforce a partition[19] in order to have access to his individed assets.

At first some Courts argued that an absolute alienation by way of auction sale of a co-parcener's individed interest, without the consent of the others, where no justification binding on the family could be traced, was judicially impossible[20] but a decision of the Privy Council in 1873 left no room for doubt but that the interest of any co-parcener could be attached by a Court at the instance of

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16. See the Mitakshara I.i.27-29. Alienations are allowed in time of distress (āpatkāle), for the benefit of the family (kuṭumbārthe), for pious purposes (dharmārthe).

17. (1856) 6 M.I.A. 393. The case is technically on the powers of a mother as guardian for an infant heir. For its application to the joint family situation see Mayne (11d) 459-579; Mulla (13d) 273-283; Derrett: I.M.H.L. 266-277, CMHL (1970) 426ff; Kane III HD 449-450.

18. For an account of the effect of English equity on certain aspects of the rule see Derrett: The misty origins of Anglo-Hindu law in CMHL (1970) App.II pp.425-432.

19. See Strange : I Elements of Hindu Law (1825) 179 relying upon the case cited by him at Volume II, 283 (note Colebrooke's comments at 283-4); letter by Colebrooke: Dated May 18 1812 (quoted by Strange at Volume II 419 at 421-2) where he says "Injury and injustice may, however, be prevented by holding him (the co-parcener) and his property answerable for the repayment of the money or valuable consideration received by him; and equity, perhaps would award partition for the purpose of enforcing payment from his share, thus rendered a separate one."

20. See Glover J.'s judgement in Bhyro Pershad v Basisto (1871) 16 W.R. 31 (a case dealing with the father) where he distinguishes Gour Suran Doss v Ram Surun Bhakat (1866) 5 W.R. 54 as not applicable because it dealt with the debts of a son. See also Rajaram Tewary v Luchmun Pershad (1867) 8 W.R. 15 F.B. This distinction was probably inspired by the fact that the son is liable to pay the father's debts.

his creditors.[21] This is technically at variance with the Mitakshara, as the Privy Council admitted.[22] The next step from this was to accord to the son the right to alienate his share in undivided property.[23] This accords with the position under Dayabhaga law[24] but it was not developed on the basis of the traditional law, but rather out of considerations of equity and convenience,[25] and only operates in South India.

The law also recognised that a particular branch of the family could be given maintenance grants out of the joint family property. Although this brought about a virtual de facto partition of the property it accords with the living habits of certain castes,

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21. Deen Dayal v Jugdip Narain (1873) 4 I.A. 247; Hardi Narain v Ruder Prakash (1883) 11 I.A. 26.

22. See Suraj Bansi v SheoPersaud (1879) 6 I.A. 88 at 99-100.

23. Deen Dayal v Jugdip Narain (1873) 4 I.A. 247; This position is followed only in Madras (see Virasvami v Ayyaswami (1863) 1 M.H.C.R. 471) Bombay (see Vasudev v Venkatesh (1873) 10 B.H.C.R. 139) Central Provinces (Syed Kasam v Korawar (1922) 49 I.A. 358; Kashinath v Bapurao (1940) Nagpur 573 (F.B.)) but not in Bengal or the United Provinces (see Madho Parshad v Mehrban Khan (1891) 17 I.A. 194; Balgobind Das v Narain Lal (1893) 20 I.A. 116; Lachman Prashad v Harnam Singh (1917) 44 I.A. 163). The Calcutta High Court put up an extremely brave fight to prevent the operation of this rule in Bengal. For a description of this and a resumé of the mid-nineteenth century decisions on the subject see R.C.Mitra: The law of joint property and partition (1897 Calcutta) pp.111-114 where all the case law from Nundram v Kashee Pande (1823) Select Reports 232 to Phoolbas Koonwar v Lalla Jogeshwar Sahay (1876) 1 Cal 226 at 228 is shown.

24. See Dayabhaga II, 28. For the reasons why this is so see Kane: III H.D. 559-60.

25. This is quite evident from the references cited f.n. 19 and 22 supra. The traditional law does not accord a separate disposable interest to any co-parcener. See generally Kane : III H.D. 552-559; G.D.Sontheimer: The concept of Daya (1962, cited supra f.n.12) for the position in the traditional law.

who live separately and do not maintain a common mess.[26]

Another interesting development was the acceptance of "family arrangements" which is a technique whereby the members of a joint family can come to an arrangement whereby the rights of the coparceners and non-coparceners alike are protected.[27] Equally important was the recognition of various kinds of partial partition, which we shall discuss in some detail later.[28]

Thus we can see that Anglo-Hindu law was able to change important aspects of the traditional law, in an effort to introduce greater flexibility within the joint family and emphasise the need for giving the members of the family a greater power to deal with and safeguard their interests than simply relying on the piety of the Manager. There is in the joint family law a constant tussle between the claims of the individual for greater freedom to deal with and a greater share of joint family property on the one hand and the need to protect joint family property (which forms the basis of an economically counter-productive but nevertheless otherwise extremely important private social security system) on the other.

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26. Ramayya v Kolanda A.I.R. 1939 Mad. 611 at 913 where Ayyangar J. took note of the fact that in the Goundan caste members of the family lived separately. See comment Derrett: (1960) 62 Bom.L.R. Jnl. 57 at 63; Padmini v Samasundram (1965) 2 M.L.J. 65. See also on maintenance grants Seshchalapati J. in Lab Chandra v Chinnavadu A.I.R. 1963 A.P. 31 which follows Ramayya's case; Natesan J. in N.Venkata Subramaniya Iyer A.I.R. 1966 Mad. 266 at pr.47 p.285 (where the allottee's right to be maintained is stressed) at pr.47 p.285-6 (duty to account only to the allottee's branch not to the whole of the joint family); Ismail J. in Chinappa v Valliammal A.I.R. 1969 Mad. 187 at 189-90 (concerning a daughter-in-law's right to maintenance). See also Derrett: C.M.H.L. (1970) 65-6 quoting at 66 Ramamurti J.'s observations in Nagayaswami Naidu v Kochabai A.I.R. 1969 Mad 329 at 344-5.

27. For the best account of this see Derrett: Family arrangements (1968) 70 Bom.L.R. 1-16; ibid: C.M.H.L. (1970) 281-286. See also the following recent cases: Mania v Dty. Director, Consolidation A.I.R. 1971 All.151 (per Singh J. at pr.17 p.155 - on the interests of a daughter); Krishna Behari Lal v Gulab Chand A.I.R. 1971 S.C. 1041 (arrangement between a widow and the presumptive heir); Shambhoo Prashad v Phool Kumari A.I.R. 1971 S.C. 1337 (rights of a particular branch of the family);

28. See infra Section 3.

In this chapter we will concentrate on the two main problems that have come up before the Supreme Court :

(a) Acquisitions through a coparcener.

(b) The problem of partition in the Supreme Court.

It will be observed throughout that no light whatever could be obtained from English or Commonwealth laws and no jurisprudential writing by non-Indians could offer patterns or solutions. The problems are characteristically Indian problems, to be solved by Indians in the full light of practical acquaintance with the facts with which they are familiar. Yet no Supreme Court case clearly or systematically explains the principles (if any) behind the current case law or lays down guide lines to assist the High Courts in the solution of numberless problems created, and exacerbated, by legislation (to which we shall come).

2. Acquisitions through a coparcener.

i. The juristic approach of the Hindu jurists

Hindu jurists faced with the problem of recognising individuals' right to property followed an ad hoc method of adding to existing categories of self-acquired property (hereafter S.A.P.) rather than evaluating the relative contribution of a particular coparcener in relation to a particular acquisition and giving him a share proportionate to his contribution. It is characteristic of śāstric writers to fear and avoid generalisations and principles are frequently to be worked out from the detailed rules they supply. This topic is no exception. Isolated texts indicate how the wind used to blow.

Our own evaluation of the texts amounts to this : the ancient jurists tended to lean in favour of joint family property (hereafter J.F.P.) after making a small pocket allowance in favour of S.A.P. The controversy has in the past centred upon increasing or decreasing the categories that go to make this pocket allowance, rather than following a system of proportional entitlement. This position was considerably worsened by a Privy Council decision (see below) which refused to make a distinction between a coparcener's direct and indirect use of joint family funds.[1] Happily this decision has recently been greatly weakened by the Supreme Court.[2] But it is uncertain whether the Courts will now follow the equitable approach of proportional allotment, as a foreign observer hoped they might,[3] or whether they will stick to the old either/or approach of increasing or decreasing S.A.P.

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1. Gokal Chand v Hukam Chand (1921) 48 I.A. 162 at 172-3.

2. R.K.Singh v Commr. (1970) II S.C.W.R. 674 at 679-80, 685.

3. See Derrett: Acquisitions of Joint Family Property and recent decisions of the Supreme Court (1969) I S.C.W.R. 19; ibid: Acquisition of Joint Family Property through a coparcener: Let śāstric and equity principles join hands (1969) 71 Bom.L.R. 75-81; Ibid: C.M.H.L. (1970) 62-74; ibid: The Supreme Court and the acquisition of property: Some latest developments (1971). I S.C.W.R. (w) 7.

The ancient texts gradually came to accept the need to recognise individual property.[4] Thus it was accepted that acquisitions obtained without any detriment to the J.F.P., gains of learning, presents at one's marriage or from friends, were S.A.P.[5] This was no mean achievement in itself, for years later Holloway J. complimented the recognition of these categories as "well timed and sensible".[6] Later jurists attempted to increase or decrease the above stated categories. Thus Vijñāneśvara, who favoured J.F.P., insisted that the acquisition must be made without detriment to the mother's as well as the father's estate.[7] He also went a step further and opined that there was a detriment to the estate, where the marriage was in the Āsura form (where the girl was actually or nominally paid for) and that in such cases all marriage presents were J.F.P.[8] Gautama had tried to increase the categories of S.A.P. by stating that gains of learning were not to be shared with an ignorant coparcener,[9] though this must be read with Narada's text that an ignorant coparcener is entitled to a share, if he maintains the acquirer's family.[10]

Emphasis was laid on whether there was any detriment to the estate rather than a proportional entitlement between the joint family and the acquirer. This could only have been the case if the śāstrīs has been under the impression that "detriment" is equivalent to an overt or covert investment on the family's behalf.

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4. See Section 1 of this Chapter and the references cited there.

5. Manu IX, 206, 208; Yājñavalkya II, 113-119.

6. See Holloway J. in Chalkonda v Ratnachalam (1963) 2 M.H.C.R. 56 at 61.

7. Mit.I.iv.2; see also the Smriti Chandrika VII,28 which extends the restriction so as to include brother's estate.

8. Mit.I.14.6.

9. See Colebrooke's Digest (hereafter C.D.) Vol.II, 453-458 commenting on the text quoted Book V, text 355.

10. II C.D. 461-3 discussing Book V, text 357.

There are however some examples where a proportionate entitlement has been advocated. Thus while the normal rule was that property acquired jointly, through joint funds or with the aid of J.F.P.,[11] was J.F.P. Vasishtha lays down :

> "He among them who singly acquires wealth, shall take a double share of it." 12

Again, a text attributed to Sankha lays down

> "But land which had formerly been lost, and which a single heir shall recover by his own exertion, his co-heirs may divide according to their allotments, having first given him a fourth part of it." 13

Jagannātha approves of both these texts and lays down principles for a proportionate distribution.[14] Other writers also relied on these and similar texts.[15]

There is also an old text attributed to Kātyāyana which states

> "the father gets two shares or half the wealth acquired by the son." 16

The various proportionate allotments possible under this text have been discussed by the Dāyabhāga.[17]

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11. Manu IX 204; Brihaspati XXV,14; Mit.I.lv.15.

12. II C.D. 458 Text 356. The property must be acquired with the help of J.F.P., otherwise it would be S.A.P. See the comments at II C.D. 356.

13. II C.D. 464 V Text 359. Note the opinion of Yājñavalkya (II,119) that this is J.F.P.

14. See his comments at II C.D. 458 on the Vasishtha text and on 464-5 on the text by Sankha.

15. Vasishtha is relied on in the Vyavahāra Mayūkha IV.7.8. (Borradaile Trans 1879, 67).

16. Kātyāyana (Kane's collection 851).

17. See the comments in the Dāyabhāga (II,66-72) and the objections of Mitra Mishra in the Vyvahara Prakash of the Viramitrodaya. These are discussed by Kane III H.D. 578. The relative importance of all these texts is also discussed by Derrett: Acquisitions of Joint Family property and recent decisions of the Supreme Court (1969) I S.C.W.R. 29 f.n.6.

Thus we can see that although some rules of proportionate allotment were laid down, they are left unrefined. The allotment takes the form of prefixed portions, rather than an analysis of the actual contributions involved. It is however characteristic of the śāstra to mention fractions when relative proportions are intended. Jagannātha, presumably, as one writer suggests,[18] under the influence of English equity principles, tried to refine these rules, but this does not appear to have had any creative impact upon Anglo-Hindu law.[19]

ii. The Anglo-Hindu Experience.

a. The formal rules.

The best example of the Anglo-Hindu approach can be seen in the decisions on whether "gains of learning" are joint family property or not. The śāstric texts suggest that gains of learning are S.A.P.[20] But a gloss on the texts by the Mitakshara lays down that the gain,

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18. Derrett: C.M.H.L. (1970) 79; R.L.S.I. (1968) 245-250.

19. The Kātyāyana text is relied on by Rampini and Mookerjea JJ. in Dharma Das v Amulydhan (1906) 33 Cal.1119 at 1126; they also refer to Sreenarain Berah v Gooro Pershad Berah (1866) 6 W.R. 219 where such a proportionate allotment was actually made. In this context see also Sheo Dayal Tewaree v Bishonath (1868) 9 W.R. 61; Visalatchi Ammal v Annasamy (1869) 5 M.H.C.R. 150 at 152-3 where both the Sardar Amin and the High Court refer to the texts but no mention is made of proportionate allotment; Bajaba v Trimbak (1909) 34 Bom. 106 at 110 where the Court refers to the Vyavahāra Mayūkha IV.7.3; Mit I.v.3. on the quarter share rule but adds "If these texts involve the conclusion the result would be anything but equitable". Note that under Anglo-Hindu law the quarter share rule does not apply where the recovery was solely with the use of S.A.P. or where the loss to the family was purely voluntary. (See Srinivasan I Hindu Law (1969 Edn) 781-3; Mayne (11d.) 358-9) G.S.Sastri: A treatise on Hindu law (1910 4d. also 6d. 447-8) 273 suggests that the rule apply at partitions.

20. See Kātyāyana cited Mit.I.iv.8; Smriti Chandrikā VII, 2 and 4; Nārada XIII, 10. Manu IX, 206. see also the Vivād Chintāmani (Jha 4dn. 1942) 216-219 or Sections 942-946. These are discussed by Kane: III H.D. 581-585; Mayne (11d) 352-356. For the authorities on the subject see also Mulla (13d.) 258-259; Derrett: I.M.H.L. (1963) 336-7.

unless of an exceptional nature, must not have been acquired to the detriment of J.F.P.[21] The Dāyabhāga tries to soften this approach that mere maintenance cannot be regarded as a detriment.

> "It does not become common property merely because joint property was used for food and other necessaries; since that is similar to the sucking of the mother's breast." 22

On a prima facie view it appears that British Courts followed the strict Mitakshara text.[23] Thus in Luximon Rao v Mullar Rao (1831)[24] Lord Brougham allowed a nephew of the Peshwa's Prime Minister to claim the latter's assets because the Prime Minister

> "maintained a more intimate connection (with his ancestral village family) than would be supposed natural to a man placed in a much higher position than the rest of the family and separated from it by local circumstances."

Years later Melville J. commenting on the strict test used in this case felt that the judgement

> "gives forth an uncertain sound ... for its ratio would be equivalent to saying that no member of a united family, who shares in an ancestral family, can acquire separate property." 25

Even so this strict test became law and culminated in the proposition in the famous case of Gokul Chand v Hukam Chand (1920)[26] where the Court

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21. Mitakshara I.iv.7, 8, 9-14. See Kane III H.D. 579 and note the comment of Mayne (11d) 354 f.n.(p). "This almost the only question on which Vijñāneśvara is neither logical or progressive." What Vijñāneśvara did in fact was to state that the words "detriment to the estate" qualify also the four exceptions of which "gains of learning" was one.

22. Dāyabhāga VI, I, 44-50 quoted by Mayne (11d) 354; see contra Vivada Chintami (Jha Edn. Text 942 p.216) quoting Kātyāyana "Where a man has acquired learning from others while living on food supplied by others, (viz. strangers) whatever is obtained by him by means of learning is called gains of learning." Note the comments of the editor in the footnote on p.216.

23. The Mitakshara text is relied upon very heavily in Gokul Chand v Hukam Chand (1921) 48 I.A. 162 at 167.

24. (1831) 2 Knapp. 60.

25. In Lakshman Mayaram v Jamna Bai (1882) 6 Bom. 225 at 232.

26. (1921) 48 I.A. 162 at 172-3.

rejected the argument that a distinction can be made between a direct and indirect use of J.F.P. In the meanwhile the Court decided a number of cases where they ruled that where an undivided person was educated at the expense of patrimony, his earnings were J.F.P.,[27] unless the education was of a merely rudimentary nature[28] since (scilicet) in the latter case "there was no real and sufficient connection" between the education and the gain. The formal rule that while considering "detriment" no distinction can be made between direct and indirect uses of J.F.P. has been abrogated with respect to gains of learning by statute,[29] but it still applies in relation to all other kinds of acquisitions. The formal tests are still "detriment" and "real and sufficient connection".

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27. Applied in Gokul Chand v Hukam Chand (1921) 48 I.A. 162 (Civil Servant); Durvasula Gandhandhu v Narasammah (1872) 7 M.H.C.R. 47 (D.B.) (vakil); Bai Manchha v Narotamdas (1869) 6 Bom. H.C.R. (A.C.J.) 1 ((pleader) Chalkonda Alasani v Chalkonda Ratnachalam (1864) 2 M.H.C.R. 56 (dancing girls - not strictly concerned with joint families but it was assumed that it was customary to apply the same rules).

28. Metharam v Rewachand (1918) 45 I.A. 41 at 45 (banker); Durga Dutt Joshi v Ganesh Dutt Joshi (1910) 32 All. 305 at 313 (astrologer); Lachmin Kuar v Debi Prashad (1898) 20 All. 435 (army contractor); Krishnajee v Moro Mahadev (1891) 15 Bom. 32 at 39 (clerk); Lakshman Mayaram v Jamnabai (1882) 6 Bom. 225 (judge); Boologam v Swornam (1881) 4 Mad. 330 (dancing girls); Pauliem Valloo Chetty v Pauliem Sooryah Chetty (1877) 4 I.A. 109 at 117 (obiter statement). See also Jai Dayal v Narain Das A.I.R. 1932 Lah. 127 (Civil Servant) - note that this case was reported after the Hindu Gains of Learning Act, 1930, but decided 23rd March 1925.).

29. The Hindu Gains of Learning Act 1930. Reproduced Derrett I.M.H.L. (1963) 625-6. Even after this Act some cases have arisen on the income of hereditary income of priests where the emphasis has been on the hereditary nature of the income rather than the gain of learning. See the early Bombay cases of Ghulabhai v Hargowan Ramji (1911) 36 Bom. 94 (where such property was held to be ancestral) and note that it was distinguished by Sulaiman and Mookerjee JJ in Hanso Pathak v Harmandhi (1934) 56 All. 1026 at 1028, 1031. See also the more recent Ramakrishna v Vishnumurti A.I.R. 1957 Mad. 86.

ii. b. The Informal Techniques.

The social facts which motivated the decisions.

If we have a closer look at the gains of learning decisions, we will see that while the Courts formally accepted the detriment test, in actual fact the Courts refer to a complex of facts about the social and financial state of jointness of the families concerned. Thus in the 1831 case involving the Prime Minister the Court stressed that the Prime Minister had maintained a strong connection with his ancestral family.[30]

Again in Goor Churn Dass v Goluckmoney Dossee,[31] Grant J. took note of the fact that one brother was blind and that the family lived together. In Bai Mancha v Narottam Das,[32] Couch C.J. (for Newton J.) while admitting that they had to apply the law strictly, observed

> "nor having regard to the usage of native society do we think it is a bad law."

In this case the family lived together but kept separate accounts. Again, in two cases on the income of dancing girls, the Madras High Court decided that the income was J.F.P. in one and S.A.P. in the other. Although the cases purport to be decided on the grounds that the education received was not used in the latter case, the Court was influenced by the fact that in the former case the disputed ornaments were ancestral property and that the dancing girls lived together, whereas in the latter case the girls concerned had ceased to dance and

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30. (1831) 2 Knapp 60.

31. (1843) Fulton 164 at 184-5. He made a distinction between wealth acquired and wealth "improved" or "augmented" and concluded (at 186-7) that in this case there was just an improvement.

32. (1869) 6 B.H.C.R. 1 at 6.

attend nautches.[33] In two cases from Allahabad, the decisions are based on the rule that rudimentary education did not provide a real and sufficient connection, but it is clear that the Court was influenced by the fact that in the case of the astrologer he lived separately from the very start.[34] In the case of the army contractor, the Court emphasised that the brothers

> "did not work jointly, each being separately employed and no one of them is shown to have any concern with the savings and accumulations of the other two brothers, though no doubt funds may have been remitted by one or other to the others for investment." 35

Similar references to the social level of jointness can also be shown in other cases.[36]

ii. c. Two distinct approaches

Thus what we get are two distinct approaches. A formal approach stressing the "detriment" and "real and sufficient connection"

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33. The two cases are Chalkonda v Ratnachalam (1864) 2 M.H.C.R. 56 where the property was regarded as J.F.P.) see p. 78; Boologam v Swornam (1881) 4 Mad. 330 at 333. Holloway J., who decided the former case, also held that in Durvalulu v Narasammah (1872) 7 M.H.C.R. 47 the learning of a vakil was rudimentary. This caused Sir John Edge to remark in the Privy Council in Metharam v Rewachand (1918) 45 I.A. 41 at 50 "Apparently Holloway J. regarded the learning in the law required by a vakil of his day as inferior to the science necessary ... (to) the life of an Indian dancing girl.". But the real explanation can only be found in the difference in social jointness in the two cases.

34. Durga Dutt Joshi v Ganesh Dutt Joshi (1910) 32 All. 305 at 308-9 (per Stanley C.J. and Banerji J.).

35. Lachmin Kuar v Debi Prashad (1898) 20 All. 435 at 437 (per Burkitt and Dillon JJ.).

36. e.g. Note the difference of opinion between Holloway J. (in the Courts below) and the Privy Council in Pauliem Valloo v Pauliem Sooryah (1877) 4 I.A. 109; In Krishnajee v Moro Mahadev (1891) 15 Bom. 32 where the brother obviously maintained a connection with the family. Birdwood and Candy JJ. therefore used another legal device to meet the needs of the situation by remanding the case to see if there had been a blending. Contrast the approach of Melvill and Kemball JJ. in Lakshman v Jamnabai (1882) 6 Bom. 225.

tests and an informal reference to the social state of jointness in the family so as to ascertain whether the property could have been intended to be treated as J.F.P. If a person in fact lived socially and financially joint with his family, the use of the informal approach ensured that an otherwise joint person could not cheat his family creditors by stating that the property was a gain of learning when in fact he treated it and used it for joint family purposes, even though it might not technically be capable of being declared a blending.[37]

It is only to be expected that the social facts of a case become less important in a Court of Appeal, which is concerned solely with points of law. This is precisely what happened in the Privy Council cases where emphasis was laid on the formal rule rather than the informal, but not necessarily extra legal, assumptions that formed the rationale of the cases on which the formal rule was based. This is particularly true of the famous Gokul Chand v Hukam Chand case (1921) where the judgement applies the strict Mitakshara text[38] and refers to the cases discussed above[39] without making any reference to the social facts the judges in those cases relied on.

The result was the emergence of a strict rule unqualified by the other circumstances, which had been so important in determining its application to a particular case. We have to bear this in mind while considering the Supreme Court Cases.

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37. The blending argument was used in Krishnajee v Moro Mahadev (1891) 15 Bom. 32 where the case was remanded to see if there was a blending. On blending see Nuthbehari v Nanilal A.I.R. 1937 P.C. 61 (mere failure to keep separate accounts is not blending) and more recently Chinna v Lakhsmamma A.I.R. 1963 S.C. 1601 at 1604; G.Narayana Raju v G.Chamaraju A.I.R. 1968 S.C. 1276; Derrett I.M.H.L.(1963) 337-8.

38. (1921) 48 I.A. 162 at 167.

39. Ibid at 168-9

iii. The Supreme Court - Directors' Fees and Insurance Payments.

We are concerned here with two problems. Firstly, where a coparcener invests joint family assets in a company or a firm, should the fees given him for the post he is appointed to, as a result of the joint family investment, be regarded as J.F.P. or S.A.P. ? Secondly, where the premiums of a life insurance policy are paid out of J.F.P., should the payments paid when the policy materialises be regarded as J.F.P. ?

iii. a. The Problem of Directors' Fees.

1. The background to the Supreme Court cases.

To begin with it must not be forgotten that the Supreme Court cases are to be considered from the point of view of tax avoidance. Although Hindus in India live in Joint Families, Parliament has thought fit not to grant extensive tax concessions to such families even though their expenses and financial responsibilities are greater than those of a nuclear family.[40] Joint Families have tried to meet this problem not by asking Parliament for greater concessions

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40. See the Finance Acts 1962-68 Schedule I. The 1968 Act made some changes but these were not consequential from the joint family point of view. For a study of the tax situation see I.S.Gulati & K.S.Gulati: The undivided Hindu Family: A study of its Tax privileges (1962 A.P.H.). For the revenue approach to the whole problem see K.D.Gaur: Crimes relating to Income Tax in India (1971 - Thesis No. 400 at the Institute of Advanced Legal Studies) (hereafter cited as Gaur (1971) Thesis) 88-107. But Gaur adopts without discussion Derrett's view as regards apportionment on the basis of proportionate entitlement. This view is fully discussed below. Derrett in his latest article : The Supreme Court and the acquisition of Joint Family Property (1971) I S.C.W.R. 7 at 10 ends the article with the comment "These latest decisions are virtually in favour of the revenue. Is that an adequate justification for them ?" This is obviously a slip of the pen, because the decisitions are not in point of fact in favour of the revenue but in favour of the assessee. I am also grateful to K.C.Tewary of the Revenue Dept. Bombay for his help and comments. On losses to the Government due to fictional partition see T.V.Mehta: Aspects of Taxation in our developing society (1971) 12 Guj. L.R.Jnl. 24 at 32-33.

but by either partitioning their property for tax purposes[41] or putting forward the claim that although they are joint a large part of their assets (like directors' fees) are S.A.P. The dilemma that the Supreme Court faces is that if it supports the individualisation of property it will also have to support a form of tax avoidance, whereas if they seek to prevent tax evasion they will be forced into taking a traditional attitude in favour of J.F.P., which does not suit the reforming attitude they profess to adhere to.[42]

The High Courts when dealing with these problems had taken various stands. Some judges applied the Gokul Chand tests strictly.[43] Other judges took a doctrinaire view that the individual's efforts must be recognised[44] and relied upon English cases where a similar

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41. S.25 of the Income Tax Act 1922 and now S.171 of the Income Tax 1961 note the commentof Derrett: C.M.H.L. (1970) 148-9, and at (1961) 63 Bom.L.R.J. 17 ff. The best discussion of the advantages to be gained from partial partition are discussed in Gulati & Gulati (supra f.n. 40) Table 28: Estimated loss of revenue due to avoidance of income tax through partial partition ... in 1958-9 at p.78.

42. Hegde J.'s dissenting judgement in V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 683 at pr.31 p.696.

43. The best example of this is Bhandari C.J. in Bhagwan v I.T. Commr. A.I.R. 1959 Punjab 594 particularly at pr.16 p.598-9. He also relied on Gokul Chand's case (1921) and I.T.Commr. v Kalu Babu Lal C.A.431 decided 15.5.1959 which was approved by the Supreme Court A.I.R. 1959 S.C. 1289. See further T.T.Rathnasabapath v C.I.T. A.I.R. 1967 Mad. 340 discussed Derrett: C.M.H.L. (1970) 67 f.n.10.

44. Typical is the approach of Manohar Lal J. in Indra Singh v I.T. Commr. A.I.R. 1943 Pat. 169 (note there was dispute in this case whether the property was joint family property - at 176. But the blending rule was applied very strictly.) I.T.Commr. v Darsan Ram A.I.R. 1946 Pat.50 where he emphasises that the joint family were gathering dividends anyway; Rajgopalan J. in K.G.Estates v I.T.Commr. A.I.R. 1956 Mad. 487 at 489; S.Rao and Shastri JJ. in Murugappa v I.T.Commr. A.I.R. 1952 S.C. 828 at pr.4 p.829. See also R.H. & Son v I.T.Commr. A.I.R. 1953 Mad.209; Mack J. in Narasamma v Venkatanarasi A.I.R. 1954 Mad.282 at pr.5 p.284 where he takes the view that individual initiative must be recognised in rural as well as urban areas. Contrast Venkarammayya v Venkataramappa A.I.R. 1953 Mad. 723 where notice is taken of the fact that the acquirers lived separately (at pr.11 p.725).

result was reached, forgetting that a joint family situation was totally different.[45] Other judges examined the facts of the cases to determine if the fees were paid for a coparcener's personal services or merely because he held the necessary qualification shares on the joint family's behalf.[46] In the last mentioned cases the judges tended to rely more on the wording of the partnership deed or the Articles of Association of the firm or company respectively rather than the intention of the family and their living habits.[47] This, as a foreign observer had rightly pointed out, makes the whole issue rest more on how cleverly the documents are drafted rather than the facts of the cases.[48]

More recently Professor Derrett has made the suggestion that the Court should seek to treat the problem as one of equity, apply the principles of Section 88 of the Indian Trusts Act 1882[49] and distribute

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45. See the judgement in I.T.C ommr. v Sankaralinga A.I.R. 1950 Mad. 610 (citing and following Dover Coalfield Extn. Ltd. (1908) I Ch. 65) where emphasis was laid on the fact that the Director got his money under a contract of service.

46. Particularly the nineteenth century case Jugmoham Mangal Das v Sir Mangal Das Nathuboy (1886) 6 Bom. 528 (where the Director refused to work further, and was persuaded to do so because of the remuneration); Chagla J. in Ram Chandra v Chimibhai A.I.R. 1944 Bom. 76; distinguished in Re Haridas Purshottam A.I.R. 1947 Bom.299.

47. For a good example see Manickam Chetty v Kamalam (1937) I M.L.J. 95 at 98 where the Court relied upon "the unambiguous declaration at the end of the document ... "

48. See Derrett (1969) I S.C.W.R. 29 commenting on I.T.Commr. v D.C.Shah A.I.R. 1969 S.C. 927. This point is also made by Gaur (1971) Thesis 104.

49. See Derrett: Acquisition of joint family property through a coparcener: Let Śāstric and equity principles join hands (1969) 71 Bom.L.R.Jnl. 75; ibid: Acquisition of joint family property and recent decisions of the Supreme Court (1969) I S.C.W.R. 29; ibid C.M.H.L. (1970) 67-73; ibid: The Supreme Court and the acquisition of joint family property - the latest developments (1971) I S.C.W.R. 7-10. This plea is accepted without criticial examination by Gaur (1971) Thesis 105-7.

proportionately the "fees" on the basis of the relative contribution of the joint family and the individual.[50] For this theory of proportionate entitlement he relies on the śāstric texts (to which we have referred above[51]) as well as the recent House of Lords decision in Boardman v Phipps.[52] In fact neither of these sources totally justify a proportionate allotment of the kind contemplated. We have already seen that the śāstric texts talk in terms of nominally pre-fixed proportions and do not in themselves literally lay down principles for wider application. Boardman v Phipps was in the main concerned with the wider problem of whether a trustee could be made accountable for profits resulting from "information" acquired by him in the trust business[53]. The Court in view of the honest dealings by the trustee s also approved of awarding them generous payments on a liberal scale for

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50. Section 88 of the Trusts Act 1882 lays down "Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interest of another person, by availing himself of his character gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other persons and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained." For an affirmation of the general rule in which S.88 has been applied see C.G.Chetty v C.S.Chetty A.I.R. 1959 S.C. 190 at p.197 (partner who renews lease accountable; but not applied to this case because lease renewed after termination of partnership); P.Leslie & Co. v V.O.Wapshare A.I.R. 1969 S.C. 843 (the rule was affirmed but again not applied because of the honest dealings in the case). See also S.90 of the Trusts Act. Illustration(a) " A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be continued as the inamdar of the village. A holds the village for the benefit of himself and the other members."

51. See supra Chapter V Section 1.

52. Boardman v Phipps (1966) All E.R. 721 (1967) 2 A.C. 124. See also comment of Gareth Jones: Unjust enrichment and the fiduciary's duty of loyalty (1968) 84 L.Q.R. 472 particularly at 478-497 where he takes the view that where the trustee has been honest he should not be made accountable at all.

53. On this see the way in which the House of Lords deal with Aas v Benham (1891) 2 Ch. 244. in Boardman v. Phipps (supra fn. n52)

their work and skill.[54] In such a situation, equity inevitably weighs heavily in favour of the trust (or in our case the joint family) on the basis of the well known rule in Keech v Sandford[55] and the allowances made to the trustee are more by way of generous expenses than a relative contribution.[56]

We must remember that this is not a simple problem of evaluating relative contributions - as in the case of distributing communal property after the divorce of a husband and wife[57] but a problem of "conflict of interests" and the Court has to be careful to ensure that the quasi trustee's interests do not conflict with his fiduciary duty to the family. Certainly, this equitable approach should be followed, but judges must be prepared to look at the living habits of the families before them, and enquire whether in fact the Director concerned really made a blending of his property with the rest of the joint family funds, or is merely indulging in a tax avoidance manoeuvre. The solution lies in sifting through the evidence,

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54. This point was first made by Wilberforce J. at first instance (1964) 2 All.E.R. 187."But in addition to expenditure ... the defendants should be given an allowance or credit for their work and skill." (at 208). But he finds very "scanty" authority for this proposition and cites Cohen J. (as he then was) in Re Macamad etc. v Codd (1945) 2 All.E.R. 664. The learned judge's arguments were adopted without much discussion in the Court of Appeal (per Denning M.R. in (1965) 1 All.E.R. 849 at 857-8) and the House of Lords (see Cohen L.J. and Hodson L.J. in (1966) 3 All.E.R. 721 at 744 and 749 respectively).

55. Keech v. Sandford (1726) Cas.Temp.King 61 at 62 per King L.C. This case lays down the rule that a trustee's interest cannot be allowed to conflict with that of his cestuii que trust even if his dealings were honest.

56. See f.n.54. But note that in Boardman v Phipps (supra) the trustee was accountable to the respondent only to the extent of 5/18 of the profit because that amounted to the respondent's share of the trust property. But although this is mentioned by Derrett (1969) I S.C.W.R. 29 at pr.7 p.34-5, I.M.H.L. (1970) 74, this is not relevant for our analysis of the Supreme Court cases where the family invariably contributed all the money to buy the shares.

57. As an example of this see R. Ehrenpreis: Community property: comingled accounts and the family expense presumptions (1967) 19 Stan.L.R. 661-670.

refining the legal concepts of "jointness", "blending" and "maintenance grants" and considering whether the man in fact treats his property as S.A.P. or not, whether it is within his power to do so and if not what rights are reserved to the family. Thus an "undivided director" who lives and maintains his family separately, should be able to claim that his fees are S.A.P. for tax purposes, even though his claims under the Boardman v Phipps rule would be negligible. We must now forget that we are dealing with a problem of tax avoidance. A man must be paid for his efforst (this is good sense); but whether he should be allowed to gain tax advantages depends on how his income is used. The important questions are : can it be treated as figuring as if it were a maintenance grant ? Can it be assumed that, by continuing to maintain and educate his family at F.F.P. expense, he must be taken to have blended his acquisition and thrown it into the hotch potch ? Should a manager be paid for services to the family ?[57a] This last seems quite contrary to Hindu tradition.

iii. b. The Supreme Court Cases.

Between 1959 and 1971 the Supreme Court has considered twelve cases on the subject. The voting and judgement-writing pattern in these cases is shown in the Table below.

Six of these cases are on partnerships,[58] five on companies,[59] and in one the joint family had provided security for the Karta getting

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57a. This point was considered by only Bhargava J. in M/S Jugal Kishore v I.T.Commr. A.I.R. 1967 S.C. 495 (below); the first point was considered by Das C.J. in I.T.Commr. v Babu Lal A.I.R. 1959 S.C. 1289.

58. Mathura Prashad v I.T.Commr. (1966) 60 I.T.R. 428; M.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 682; V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 683; I.T.Commr. v G.V. Dhakappa (1968) II S.C.W.R. 237; Commr. I.T. v D.C.Shah A.I.R. 1969 S.C. 927; Prem Nath v Commr. (1970) II S.C.W.R. 545.

59. I.T.Commr. v Babu Lal A.I.R. 1959 S.C. 1289; M/S Jugal Kishore v I.T.Commr. A.I.R. 1967 S.C. 495; Palianappa v I.T.Commr. A.I.R. 1968 S.C. 678; P.N.K.Iyer v I.T.Commr. A.I.R. 1969 S.C. 893; Raj Kumar v Commr. (1970) II S.C.W.R. 674.

TABLE I showing the voting and judgement writing patterns in cases on Directors' fees 1960-71.

Judges' Names	1	2	3	4	5	6	7	8	9	10	11	12
S. R. Das	*											
Bhagwati	v											
Das Gupta	v											
Hidayatullah	v	v										
S. K. Das		v										
Kapur		*										
Subba Rao			v									
Wanchoo					v	v	v					
Shah			*	v				*	*	v	*	v
Sikri			v									
Bhargava				*								
Bachawat					v	v	v					
Ramaswami					*	*	*	v	v	*		
Mitter					v	v	v					
Hegde					v	+	+				v	*
Grover								v	v	v		v

Key: * = majority judgement; v = concurrence in majority judgement.

+ = dissenting judgement.

1 = I. T. Commr. v Babu Lal A.I.R. 1950 S.C. 1289

2 = Piyare Lal v I. T. Commr. A.I.R. 1960 S.C. 997

3 = Mathura Prashad v I. T. Commr. (1966) 60 I.T.R. 428

4 = M/S Jugal Kishore v I. T. Commr. A.I.R. 1967 S.C. 495

5 = Palaniappa v I. T. Commr. A.I.R. 1968 S.C. 678

6 = M. D. Dhanwatey v I. T. Commr. A.I.R. 1968 S.C. 682

7 = V. D. Dhanwatey v I. T. Commr. A.I.R. 1968 S.C. 683

8 = I. T. Commr. v G. V. Dhakappa (1968) 2 S.C.W.R. 237

9 = P. N. K. Iyer v I. T. Commr. A.I.R. 1969 S.C. 893

10 = I. T. Commr. v D. C. Shah A.I.R. 1969 S.C. 927

11 = Prem Nath v Commr. (1970) 2 S.C.W.R. 545

12 = Raj Kumar v Commr. (1970) 2 S.C.W.R. 674

a job as Treasurer in a Bank.[60] The fact that the Karta had credited his fees to the joint family account was taken note of in only one case.[61] Evidently, a plea for proportionate entitlement was also made in that case at the tribunal stage of the proceedings but was abandoned later.[62]

It should be noted that all these cases involve the fees to the Karta of the family,[63] but the question whether a Karta can receive payment for his services to the family has been completely ignored in all but one case. In M/S Jugal Kishore v I. T. Commr.[64] Bhargava J., reading the judgement of the Court, considered an agreement in which the Karta was given a fee. His lordship had great difficulty in distinguishing an old Madras case which laid down that a Karta was not entitled to any remuneration.[65] But he took a very common sense approach to the whole problem looking at it from the point of view both of the revenue and (it would seem) the level of jointness of the family. He laid down the following test :

> "(I)f a remuneration is paid to a karta of the family under a valid agreement which is bona fide and in the interest of and expedient for the business of the family and the payment is genuine and not excessive, such remuneration must be held to be an expenditure laid out wholly and exclusively for the purpose of the business of the family and must be allowed as an expenditure under the ... Act." 66.

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60. Pyare Lal v I. T. Commr. A.I.R. 1960 S.C. 997.

61. I. T. Commr. v Babu Lal A.I.R. 1959 S.C. 1289 at pr.4, p1290

62. Ibid at pr. 8. p 1291.

63. There is however a case where fees paid to a junior member of a family were allowed to be assessed as separate income. See Hidayatullah J.'s judgement in Jitmal v I.T.Commr. (1962) 44 I.T.R. 887.

64. A.I.R. 1967 S.C. 495.

65. Ibid at pr.4 p.496 distinguishing (on the basis that the statements were vague) Krishnaswami Ayynagar v Rajagopala Ayyangar (1895) 18 Mad. 73.

66. Ibid at pr. 8 p.497 col.2.

This test allows the Court to consider many factors and perhaps even work out a proportional allotment on the basis of the extent to which the payment is a bona fide payment.[67]

(i) Following Gokul Chand's case.

But unfortunately the Court did not look at this problem from this common sense point of view. They ignored the revenue issue, the equity issue, and the injury that is done to the family if property is assigned to members on the sole basis of their having received it as their pay. From the beginning they used the strict, technical, Mitakashara approach[68] and followed the Privy Council ruling in Gokul Chand's case. In I. T. Commr. v Babu Lal[69] the Court specifically disapproved of a Madras case, which had followed English case law[70] emphasising that the Karta was personally entitled to fees, by observing :

> "(T)hey (the judges in that case) overlooked the principles laid down by the Judicial Committee (of the Privy Council) in Gokul Chand v Hukam Chand ... where it was pointed out that there could be no valid distinction between the direct use of joint family property and the use qualified the member to make the gain on his own efforts." 71

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67. See on this Subba Rao J.'s judgement in a "tax partition" matter in I.T.O. v Bachulal Kapoor (1967) I S.C.W.R. 14 at 20 where he suggests that the Court uncover a sham partition by looking at the social state of "jointness of the family". See also on the revenue approach Gaur (1971) Thesis 93-105 where he discusses the Supreme Court cases.

68. The Mitakshara and Smriti Chandrika are actually referred to in V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 683 at pr.4-5 p.689 by Ramaswami J. But the specific approval of Gokul Chand's case in various Supreme Court cases, which purports to rely on the Mitakshara, may be taken as an implicit acceptance of the Mitakshara itself.

69. A.I.R. 1959 S.C. 1289

70. I.T.Commr. v Sankaralinga Iyer A.I.R. 1950 Mad. 610 citing and approving of Dover Coalfield Extension Ltd. In re. (1908) i Ch. 65.

71. A.I.R. 1959 S.C. 1289 at 1293 col.2.

This affirmation of Gokul Chand posed problems. Taken to its logical conclusion it would always make the fees J.F.P. in all but the most extreme cases. Indeed the Court specifically approved obiter that the fees of a Treasurer to a Bank where the family had provided the security deposit be treated as J.F.P.[72] This very question came up in Piyare Lal v I. T. Commr.[73] where Kapur J. distinguished Gokul Chand's case on the grounds that there was a difference between preparing someone for a profession and providing security.[74] He further substantiated his argument by referring to English case law and arguing that the Treasurer was a servant of the Bank and not an independent contractor, thus trying to show that although joint family funds were locked up in the process the transaction could not be treated as a joint family investment,[75] and Kapur J.'s judgement was an attempt to by-pass the impact of Gokul Chand's case, which, technically, clearly applied in this case, for in the latter the Court admitted that the Gokul Chand contract was personal,[76]

Indeed, in Mathura Prashad v I. T. Commr.,[77] Shah J. followed

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72. Ibid at p.1292 col.1.

73. A.I.R. 1960 S.C.997.

74. Ibid at pr.16 p.1002. Kapur J. distinguished the present case on the grounds that "there was (no) ... detriment to the family property within the meaning of the term as used in decided cases." This is clearly inconsistent with Gokul Chand's case.

75. Ibid at pr.11 p.1001 relying on Short v Henderson Ltd. (1946) 62 T.L.R. 427 at 429; Dharabgadhara Chemical Works Ltd. v Saurashtra A.I.R. 1957 S.C. 264 at 268 and also the Tort case of Cassidy v Minister of Health (1951) 2 K.B. 343 at 352-3.

76. In Gokul Chand's case (1921) 48 I.A. 162 at 172 it was observed "No decision attempts to distinguish between the personal and family elements in the ultimate gains; it would probably be impracticable to do so. There is equally little ground for contending that partibility depends on causa proxima, or is negatived by the intervention of the personal element of the coparcener's character."

77. (1966) 60 I.T.R. 428.

Babu Lal's case and summarily dismissed the argument that Piyare Lal's case applied. Shah J.'s view that the latter involved "obtaining a benefit which is essentially personal to the manager"[78] ignores that this was so even in Gokul Chand's case.[79]

The affirmation of Gokul Chand created definite problems and Ramaswami J. tried to revive the Madras case which has been disapproved in Babu Lal's case on the basis of the Gokul Chand case. In Palianappa v I. T. Commr.[80] he tried to get round the Court's specific approval of Gokul Chand by saying

> "The process of reasoning of the Madras High Court ... may be open to criticism and may not be sound but in our opinion, the actual decision in that case is correct and is supported by the principle that there was no detriment to the family property and no part of the family funds had been spent or utilised for acquiring and remuneration of the managing director." 81

Hegde J. in a companion case[82] however took a stronger line (dissenting) and realised that as long as Gokul Chand was still good law all that the Revenue Department had to prove was that the assessee had been immediately appointed to his post following the acquisition by the family of shares in the firm or company. Pointing out the inconsistency in the Supreme Court cases he observed :

> "In Piyare Lal's case ... this Court ignored the rule laid down by the Judicial Committee in Gokul Chand's case and this very bench did not allow itself to be influenced by that rule in Palaniappa Chettiar's case ... "

In 1970[83] he had the courage actually to overrule Gokul Chand's case.

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78. Ibid at 433-4.

79. See the quotation in f.n.76.

80. A.I.R. 1968 S.C. 678.

81. Ibid at pr.4 p.681 col.2.

82. V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 683 at pr.26 p.695 col.1.

83. Raj Kumar v I.T.Commr. (1970) II S.C.W.R. 674 at 679-80, 685.

It took the Supreme Court ten years to modify the law as stated in Gokul Chand's case, during which time they had taken evasive action to try to soften its full implications.

To revert back to Table I, we will see that the judgement of the Privy Council which had been affirmed by a bench of three judges in Case 1 and Case 2 and was itself affirmed by several benches of three and five judges respectively, was overruled by a bench of only three judges. It should also be noted that the voting behaviours of Shah and Grover JJ. are quite inconsistent. Shah J. had affirmed Babu Lal's case in his judgements in Cases 3, 8 and 9 in the Table but agreed to it being impliedly overruled in Case 12. Again, Grover J. had subscribed to Shah J.'s judgements in Cases 8 and 9 and Ramaswami J.'s judgement in Case 10. But both of them happily concur in Hegde J.'s judgement in Case 12.

Shah J.'s readiness to accept Hegde J.'s approach can perhaps best be explained by the fact that between 1967 and 1970 the Supreme Court had followed a practical test unhampered by the Gokul Chand case (as approved by the Supreme Court in Babu Lal's case), while paying lip service to the strict Mitakshara approach which those cases embody.

To this practical approach we now turn.

(ii) The practical approach in the cases between 1967 and 1970.

Although the Gokul Chand and Baby Lal cases are mentioned in several cases,[84] if we look at the facts of the decisions in the seven cases decided between October 1967 and 1970, we will see that the Court has followed a practical approach by deciding that where the firm or company in question was completely a joint family concern, the Directors' fees are joint family property. Thus in the two Dhanwatey cases[85] the partnership was in fact no more than the joint family reconstituted as a partnership firm. This is also true of P. N. K. Iyer v I. T. Commr.[86] and Mathura Prashad v I. T. Commr.[87]

But in Palaniappa v I. T. Commr.[88] the joint family owned only 90 of the 300 shares in the company. Again, in I. T. Commr. v D. C. Shah[89] and Prem Nath v I. T. Commr.[90] the joint family was a partner with other outsiders to form the partnership. The only exception to this approach was Raj Kumar v I. T. Commr.[91] where Hegde J.

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84. Gokul Chand's case is referred to in I.T.Commr. v Babu Lal A.I.R. 1959 S.C. 1289 at pr.11 p.1293; Piyare Lal v I.T.Commr. A.I.R. 1960 S.C. 997 at pr.15, 16 p.1002; V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C.683 at pr.25, 26 p.695 (by Hegde J. the dissenting judge); Raj Kumar v I.T. Commr. (1970) II S.C.W.R. 674 at pr.7 p.679-80, pr.16 p.685. Babu Lal's case is referred to in Piyare Lal v I.T.Commr. A.I.R. 1960 S.C.997 at pr.13 p.1001-2; Mathura Prashad v I.T.Commr. (1966) 60 I.T.R. 428 at 431-3; Palaniappa v I.T.Commr. A.I.R. 1968 S.C. 678 at p.679-80; M.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 682 at 683; V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 683 at 687-691 (by the majority judge) and at 694-6 (by the minority judge);P.N.K.Iyer v I.T.Commr. A.I.R. 1969 S.C. 893 at pr.9 p.895; Raj Kumar v I.T.Commr. (1970) II S.C.W.R. 674 at 678-680, 685.

85. M.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 682; V.D.Dhanwatey v I.T.Commr. A.I.R. 1968 S.C. 683.

86. A.I.R. 1969 S.C. 893 at pr.1-2 pp.893-4, p.681 col.1.

87. (1966) 60 I.T.R. 428 at 430.

88. A.I.R. 1968 S.C. 678 at pr.2 p.679.

89. A.I.R. 1969 S.C. 927 at pr.1 p.927.

90. (1970) II S.C.W.R. 545.

91. (1970) II S.C.W.R. 674.

took a wider view, to which we shall return later.

While it is true that the Court had on several occasions accepted the argument that the fees in question were paid for the Director's personal services,[92] it had been arbitrary in recognising these claims. Thus the claim was accepted in Palaniappa v I. T. Commr.[93] and I. T. Commr. v D. C. Shah[94] (where the concerns were not solely joint family concerns) but was not accepted in P. N. Krishna Iyer v I. T. Commr.[95] (where the concern was a joint family concern), even though in this case the Tribunal below had made the finding of fact that

> "the shares ... were allotted to the assessee in view of the valuable services rendered by him in the promotion of the company." 96

The point about personal services was in fact indubitably linked with the wider consideration whether the firm was a family concern or not, and even in cases where the Karta rendered valuable personal assistance by promoting the firm, the Court has not always accepted that his fees be treated as S.A.P.[97]

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92. Palaniappa v I.T.Commr. A.I.R. 1968 S.C. 678 at 681; P.N.K.Iyer v I.T.Commr. A.I.R. 1969 S.C. 893 at pr.13 p.896; I.T.Commr. v D.C.Shah A.I.R. 1969 S.C. 927 at pr.7 p.929; Prem Nath v I.T.Commr. (1970) II S.C.W.R. 545 at 547.

93. A.I.R. 1968 S.C. 678.

94. A.I.R. 1969 S.C. 923.

95. A.I.R. 1969 S.C. 893.

96. Ibid at pr.13 p.893.

97. I.T.Commr. v Babu Lal A.I.R. 1959 S.C. 1289 at pr.12 p.1293; Mathura Prashad v I.T.Commr. (1966) 60 I.T.R. 428 at 432-3; P.N.K.Iyer v I.T. Commr. A.I.R. 1969 S.C. 893 at pr.13 p.893. The promoter's position is a little different, see Weavers Mills v Blakis Ammal A.I.R. 1969 Mad. 462 at pr.18 p.470.

In the latest decision, Raj Kumar v I. T. Commr.,[98] Hegde J., after stating the various descriptions[99] of the test applied in former cases, observed :

> "In our opinion from these subsidiary principles, the broader principle that emerges is whether the remuneration received by the coparcener in substance though not in form was but one of the modes of return made to the family because of the investment of family funds in the business or whether it was a compensation made for the services rendered by the individual coparcener ... If the income was essentially earned as a result of the funds invested, the fact that a coparcener has rendered some service would not change the character of the receipt. But if on the other hand it is essentially a remuneration for the services rendered by the coparcener, the circumstances that his services were availed of because of the reason that he was a member of the family which had invested funds in that business or that he had obtained the qualification shares from out of the family funds would not make the receipt the income of the Hindu individed family." 100

It is evident from the application of this test to the facts of the case that the Court was abandoning the simple test : Is the firm in fact the family concern ? and actually considering whether the payment was for personal services. The firm in this case was really a family firm, but his lordship laid emphasis on the fact that the appellant was elected Managing Director because of his personal contribution.[101] Having thus for the first time actually found for the Director of a family concern, the Court has come very far from its decision in Babu Lal's case as well as from the practical test it had followed from 1967 to 1970. It is possible that in future the Court will evaluate all these (and other) factors while deciding cases where the Director's fees are in question.

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98. (1970) II S.C.W.R. 674.

99. The tests enumerated by Hegde J. on p.686 are: "(1)Whether the income received by the coparcener of a Hindu individed family as remuneration has any real connection with the investment of joint family funds; (2)Whether the income received was directly related to any utilisation of family assets; (3)Whether the family has suffered any detriment in the process of the realisation of the income (,) and (4) Whether the income was received with the aid and assistance of joint family funds."

100. Ibid at 686.

101. Ibid at 686.

(iii) The Court's choice of techniques.

The Supreme Court could have chosen between several techniques while adjudicating on this problem. It could, as Bhargava J. did in M/S Jugal Kishore v I. T. Commr.,[102] openly have treated this problem as a tax avoidance manoeuvre and avoided the complicated Hindu law propositions involved, by simply asking if the payments were bona fide or not.[103] Indeed it appears that between 1967 and 1970 in actual fact it did just that by deciding in favour of the joint family (and therefore the revenue) whenever the firm in question was merely a family firm. This revenue law technique (if one call call it that) has much to commend it and was followed by the Privy Council while considering the problem of partial partitions under Section 25 A of the Income Tax Act 1922.[104] But the main difficulty in such an approach is that it may tend to ignore the fact that the Court is dealing with the Hindu joint family.

In Babu Lal's case the Court looked at the matter almost solely from the point of view of Gokul Chand's case - it simply followed precedent. This led to difficulties and forced the Court to try to evade the problems attendant on following purely śāstric principles and led to the clash between Ramaswami J., who adhered mechanically to the Hindu law texts, and Hegde J., who felt that the Hindu law should be reformed. Indeed, Hegde J.'s judgements are an attempt to reform the Hindu law and individualise property relations within the family rather than find an equitable solution to the problem. To follow traditional law techniques would mean to get an "either/or"

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102. A.I.R. 1967 S.C. 495.

103. This passage is quoted and discussed supra.

104. See Sir Sundar Singh v I.T.Commr. A.I.R. 1942 P.C. 57; Lachman Das v C.I.T. A.I.R. 1948 P.C. 8.

approach which, as Professor Derrett has shown, does not really solve the problem. The equity approach could be refined (as we have seen there is scanty English authority for it) and applied discriminatingly to this area. At the same time the Court should seek to use some Hindu law techniques other than the simple detriment test which seems to have taken so much of the Court's time. The Court should for example consider whether a situation where a Director who in fact lives joint in all respects with his family can, apart from committing a fraud on the revenue, be treated as blending his property with the J.F.P. Or again if the Director in fact remits the money to a joint family account and receives some of it back to maintain his nuclear family with whom he lives separately, could the amount he is given back be treated as a maintenance grant ?

By using this assortment of revenue, equity and Hindu law techniques the Court would be able to consider more fully the state of jointness of the family, consider their living habits, and at the same time determine the matter satisfactorily from the point of view of the revenue authority. What the Court has done in fact is simply to adopt one of the Hindu law techniques used by the Privy Council in a different context. Moreover that technique, though technically good law, was itself discredited and abrogated pro tanto by the Hindu Gains of Learning Act 1930 !

The Court got bogged in the details of applying, or evading the application of, the Gokul Chand case, and was not able to explore fully other techniques that were in fact available to them. Obviously the Bar lacked originality, and the stimulus to obtain it, and this is not unconnected with the moribund condition of Hindu legal learning in India and the want of inspiration from English sources to which the Bar is accustomed to look.

iii. c. The Problem of Insurance Policies.

This problem first arose at the turn of the century. The Madras High Court delivered a series of judgements in which they followed the salutary rule that if a policy was taken out with the aid of joint family money, the beneficiary under the policy was clearly intended to be the joint family; whereas if the premia were paid out of S.A.P., the beneficiary was the person whose life was insured or his assignee or nominee.[105]

In later cases however the High Courts, in a reforming mood, reversed the presumptions. It will be useful to remember that at that period it was not known how far the general and statutory law cut across the ancient textual law which did not spell out any concept of insurance (however much it might have existed in ancient times sub modo). Thus in Balamba v Krishnayya[106] Sankaran Nair J. observed :

"Prima facie what is paid as premium is a man's own property."

The reason for this was given by Staples A.J.C. in Sugandhabai v Kesarbhai[107]:

> "A policy of life insurance is usually a personal contract between the person who is called the assured and the insurance company. It is true no doubt, that an insurance policy could be taken out for the benefit of the joint family; but the presumption would be against that as a rule, and in my opinion it would have to be proved that the policy was taken out with that intention and that the premia was paid out of joint family funds."

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105. Mahadeva Pandia v Narayan Pandia (1903) 13 M.L.J. 75; Rajamma v Ram Krishnayya (1906) 29 Mad. 21 (per S.Ayyar O.C.J. and Nair J.); Srinivas Iyengar v Thriuvengedattathaiyar A.I.R. 1914 Mad. 226 (note however that in the last mentioned case the sons were entitled to the policy as heirs as well - a point made much of by Rajmannar C.J. in Venkata Subbarao v Lakhshminarasu A.I.R. 1954 Mad.222 at 225); Oriental Government Security Life Assurance Co. Ltd. (1912) 35 Mad. 162 (per Benson and S. Ayyar JJ.). v. Vanteddu Amiraju

106. (1914) 37 Mad 483 (F.B.) at p.489.

107. A.I.R. 1932 Nag. 162.

This attitude was continued in a large number of cases,[108] and distinguished in others.[109] What the Courts did was to emphasise a point of insurance law (the contract of insurance is a personal contract) and merged it with considerations of Hindu law. There is in fact no reason why an insurance policy should not be treated as a family investment; after all it is clearly laid down that an insurance policy is assignable[110] just like any other valuable security. Again the matter can be considered from the point of view of the interest in the joint family to provide maintenance for the assured family, should he expire, and treated as a maintenance grant.

The Supreme Court considered this matter in Parbati Kuer v Sarangdhar.[111] In this case five policies were taken out from J.F.P. funds, three in the name of the Karta's own family and two for his step-brothers. Hidayatullah J., reading the judgement for S. R. Das C.J. (who as we have seen was responsible for introducing the Gokul Chand case in the Directors' fees cases) and Das Gupta J., decided on facts that the family intended these to be J.F.P. But he went on to observe :

> "(T)here is no proposition of law by which the insurance policies must be regarded as the separate property of the co-parceners on whose lives the insurance is effected by a coparcenary and that the proceeds of an insurance policy do not belong to the joint family." 112

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108. See B.I. & Real Insurance Co. Ltd. v Vellayamal A.I.R. 1937 Mad.571 at 575. Seethe comments of Derrett: The Supreme Court and the acquisition of joint family property (1960) 62 Bom.L.R.Jnl.57 at 61; Venkata Subbarao v Lakshminarasu A.I.R. 1954 Mad. 222 at 226; Re Rajambal Bai A.I.R. 1955 N.U.C. 3943 (Madras).

109. Note the obiter remarks of Krishnaswami Ayyangar J. in a different context in Ramayya v Kolanda A.I.R. 1939 Mad. 911 at 913.

110. See Section 138 of the Insurance Act 1938.

111. A.I.R. 1960 S.C. 403.

112. Ibid at pr.4 p.404.

Having reversed the presumption his lordship said that the view that an insurance policy would always mature in favour of the coparcener was too broad but did not overrule the case in which the proposition was made on the grounds that the instant case was decided on its facts.

The Supreme Court approach has been generally followed by the High Courts.[113] But this case is important because it gives us a clue to the attitude of Das C.J. It could well be argued that his judgement in Babu Lal's case (where he approved of Gokul Chand's case) was an attempt to prevent tax avoidance, but his concurrence in this judgement shows that his lordship was not prepared to follow a line of reasoning whereby joint family rights are ignored in an attempt to give the individual greater control of joint family property. Secondly, the fact that the judgement was read by a Muslim judge, who followed the strict Hindu law approach rather than accept references to wider arguments based on the nature of the insurance contract, indicates that, in 1960, the Court treated such questions strictly as Hindu law questions.

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113. See Srinuvasan J. in Karuppa Gounder v Palaniammal A.I.R. 1963 Mad. 245 at 248; Veeraswami and Kailasam JJ. in Seethalakshmi Ammal v Controller, Estate Duty (1966) 61 I.T.R. 317 at 322 (Madras); P.J. Reddy C.J. at Narayanlal v Controller, Estate Duty, A.I.R. 1969 A.P. 188 where it was decided on facts that the policy was intended for the son (at pr.10 p.191). But on the nature of the presumption that the property was J.F.P. see pr. 4 p.189 and the comment of Derrett C.M.H.L. (1970) 64-7. Note that in the last three cases cited in this note the problem was looked at once again from the point of view of the revenue law.

iv. Conclusion

To sum up, if we consider the Supreme Court's performance while arbitrating between the individuals and joint family claims to property, the Court has preferred to adopt a strict Hindu law approach, rather than explore ways and means of balancing equities in the modern context, by an extensive use of both traditional and cosmopolitan techniques in combination. Hegde J. represents a feforming trend in the Court but even he seems content with expanding the Privy Council's methods rather than evolving a pattern of his own. This attitude contrasts with their general approach in public law matters where, as we have seen, they have used (and even distorted) western techniques. In these personal law matters they have followed, unimaginatively, traditional patterns of thinking and even so they have articulated them obscurely and without apparent consciousness of the significance of what they were doing.

3. The problem of partition in the Supreme Court

i. Résumé of the Supreme Court cases

The Supreme Court has decided a large number of cases on partition; six are on impartible estates[1], one on the procedural aspects of the doctrine of pious obligation,[2] one on a problem of limitation,[3] two on the communication of intention to sever,[4] two on the minor's partition,[5] eight on various aspects of revenue law and partition,[6] two on the effects of the recent statutes granting rights to women and its effects on joint family property,[7] two on the nature of shares allotted,[8] three on various kinds of partial partition,

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1. Chinnayathi v Kulasekhara A.I.R. 1952 S.C. 29; Pushavati v Viziaram v Pushavati Visweswar (1964) II S.C.R. 403; Krishna v Sarvagna Krishna A.I.R. 1970 S.C. 1795; Rajendra Singh v Union A.I.R. 1970 S.C. 1946 (strictly on the Government's recognition of the ruler of an impartible estate); H.P. v Raj Kumar (1971) I S.C.J. 100; Dayaram v Daulat Shah A.I.R. 1971 S.C. 681 (a simple problem of the succession to an impartible estate).

2. Pannalal v Naraini A.I.R. 1952 S.C. 171.

3. Nani Bhai v Gita Bai A.I.R. 1958 S.C. 706.

4. Raghavamma v Chenchamma A.I.R. 1964 S.C. 136; Puttrangamma v Rangamma A.I.R. 1968 S.C. 1018.

5. Peddasubbaya v Ademma A.I.R. 1958 S.C. 1042; Venkata Reddi v Lakshaman A.I.R. 1963 S.C. 1601.

6. Firm Bhagat Ram v E.P.T. Commr. A.I.R. 1956 S.C. 374; Charandass Haridass v C.I.T. (1960) 62 Bom.L.R. 633; I.T.Officer v Thimmaya A.I.R. 1965 S.C. 1239; Udayan Chimibhai v I.T.Commr. A.I.R. 1967 S.C. 762; I.T.O. v Bachu Lal Kapur (1967) I S.C.W.R. 14; for [redacted] cases on whether throwing into the hotch potch and subsequently partitioning all the property to avoid taxation see Keshavalal v C.I.T. A.I.R. 1965 S.C. 866; Goli Eswariah v G.T.C. A.I.R. 1970 S.C. 1722. For the same problem from the point of rent control laws see Sarin v Ajit Kumar A.I.R. 1966 S.C. 432.

7. Munnalal v Raj Kumar A.I.R. 1962 S.C. 1493 (on S.14 of the Hindu Succession Act 1956); Satrushan v Buj Pari A.I.R. 1967 S.C. 272 (on the Hindu Women's Right to Property Act 1937). See also on the rights of co-widows of a coparcener to partition property to which they had only a life estate, Karpagathachi v Nagarathinathachi A.I.R. 1965 S.C. 1752 and compare with I.T.Commr. v Indira A.I.R. 1960 S.C. 1172.

8. T.S.Swaminatha v Off. Receiver A.I.R. 1957 S.C. 577 (on the nature of the charge where one coparcener has an owelty because he got a lesser share at partition); Sunkavilli v Goli Sathiraju A.I.R. 1962 S.C. 342.

whether as to persons or property,[9] one on what property is divisible,[10] and several on whether there was a partition or not.[11]

In this note we shall concentrate on three problems :-

(a) The problem of partial partition with particular reference to the tax situation.

(b) The question of communicating the intention to sever.

(c) The minor's right to partition - a case of overprotection.

ii. The problem of partial partition with particular reference to the tax situation.

While it is difficult to accept Dr. Jolly's view that in the very ancient days there was no such thing as partition,[12] because there are certain texts which encourage it,[13] the commentators were quite familiar with the problem that the whole family did not have to partition at once and laid down the rule that sons could not

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9. Bhagwan Dayal v Reoti Devi A.I.R. 1963 S.C. 289 (persons of the separating branch remain joint inter se); the remaining two cases in this category are on partition of joint family property stages:- Kashinath v Narsingh A.I.R. 1961 S.C. 1077; Devi Das v Shri Sailappa A.I.R. 1962 S.C. 1277 (mortgage debt left undivided).

10. Narayanswami v Rama Krishna A.I.R. 1965 S.C. 289.

11. Bhagwati Prashad v Rameshwari Kuer A.I.R. 1952 S.C. 72 (held there was a partition); Gur Narain Das v Gur Tahal Das A.I.R. 1952 S.C. 225; Rukmabai v Laxmi Narayan A.I.R. 1960 S.C. 335 (held that the partition was a sham partition); Gummana v Ragnainiamma A.I.R. 1967 S.C. 1595 (held there was a family partition not an outright partition); Mudigowda v Ram Chandra A.I.R. 1969 S.C. 1076 (held there was a sham partition to prevent the widows of a deceased coparcener from adopting). See also Siromani v Hemkumar A.I.R. 1968 S.C. 1299 (on the intention to sever and the customary rights about the special positions of certain sons).

12. Dr. J. Jolly: Hindu law of inheritance and partition (Tagore Law lectures) 90. See Kane III H.D. 565 ff. for comments and criticism.

13. Note particularly the following texts referred to by Derrett : C.M.H.L. (1970) 145: Manu IX.111; Gautama XXVIII.4 also discussed Kane III H.D. 571.

partition without the father's consent[14] and further that the coparcener who effected a partition was nevertheless still joint with his sons.[15] The former rule is still followed in Bombay[16] and the latter rule has been recently approved by the Supreme Court.[17] Equally important was the fact that all the property was not divisible. The texts lay down that certain property is impartible even though Jagannātha, quoting Bṛihaspati, laid down the rule :

> "Property held in common would be unemployed, for it cannot be given one in exclusion of another: therefore it must be divided by some mode deduced from reasoning? else it would be useless." 18

The fact that a person could remain joint with respect to some property and separate in regard to some other has been generally followed even by the Supreme Court in two recent cases,[19] even though they follow

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14. See Kane III H.D. 567-572 stressing that the Mitakshara accepted the fact that such a partition was possible in the life time of the father. But contrast the statement of Derrett in (1962) Contributions to Indian Sociology VI p.17 at 42 suggesting that this idea was unpopular amongst the successors of the Mitakshara. He states at f.n.115 "Unless I am deceived neither the excellent Smriti Chandrika nor the Byavahara Mayukh ... confirms the son's right to demand partition against the father's will: what the latter says at IV,4-6, on the subject amounts to a deposition of the father on the grounds of vice or senility." See also Jagannātha II C.D. 237-283 Distribution by a father in his life time.

15. See Mayne (11d) 520-23 for the theoretical and "Anglo-Indian" approach to the problem.

16. See the Bombay case of Apaji v Ramchandra 16 Bom.29. But note the dissent of Telang J. at 43-51 where he follows the Mitakshara position.

17. See Bhagwan Dayal v Reoti Devi A.I.R. 1963 S.C. 289.

18. Jagannātha II commenting on Text 366 at 472-3. Derrett (1961) 63 Bom.L.R.Jnl. 17-23; Kane III H.D. 587 ff.: Mayne: (11d) 511-515. See also in this connection Colebrooke's Digest II 471-477.

19. See the case of Kashinath v Narsingh A.I.R. 1961 S.C. 1077 at pr.14 p.1082 "But in the course of the proceedings effectuating a division of all the properties by a single award was apparently found inconvenient and a convenient method was applied and the property divided by stages." See also at pr.26 p.1084; Devidas v Shrishailappa A.I.R. 1961 S.C. 1277 (a mortgage bond was deemed indivisible) see also at pr.11 p.1282 on the rule that the partition was also partial as to persons).

Anglo Hindu Law to rule that the property is held by separating members as tenants-in-common.[20]

The problem however was this: can coparceners make a partition of some property and remain joint (with all the incidents of a coparcenary) with respect to the rest ? The nearest that Anglo Hindu Law got to accepting this was in the matter of the impartible estate, where the estate was enjoyed by one person but there was a right of survivorship in other members and possibly maintenance.[21] Professor Derrett's view[22] that this idea was popularised by the Supreme Court Chinnathayi's case[23] perhaps arises from dicta appearing there, ignoring the fact that in that case there had not in fact been a partition,[24] and in any case the point had been concluded by a decision of the Privy Council.[25]

20; See Devidas v Shrishailappa A.I.R. 1961 S.C. 1277 at pr.10 p.1282.

21. This is a vexed question see generally Mayne (11d). and infra p. 443 fn. 26-7

22. See Derrett: C.M.H.L. (1970) 146-7.

23. A.I.R. 1952 S.C. 29.

24. Ibid at pr.28 p.36. In fact Mahajan J. tries to show that where there is a partition the right to survivorship in the impartible estates is lost. See the way he distinguishes Vadrevu v Vadrevu (1877) 5 I.A. 61; Tara Kumari v Chaturbhuj (1915) 42 I.A. 192 at pr.20 p.34 relied on by Derrett I.M.H.L. 331.

25. See the Privy Council case of Konamal v Annadada (1927) 55 I.A. 114 at 128 where the remarks are quite clearly obiter because the Court relied on the fact that there had been a family arrangement in this case. But the obiter was later relied on in Bal Mukundji v Gokaran A.I.R. 1956 All. 124 at 126. The idea that in the case of impartible estates partition and relinquishment of the right to survivorship are necessary was evolved by the High Courts independently of the Supreme Court (see Gangadhar v Din Dayal A.I.R. 1954 Or. 142; S.P.Chinnathambiar v Rama Pandia A.I.R. 1954 Mad. 5; Jitendra v Bhagwati Prashad A.I.R. 1956 Pat. 457; Bal Mukundji v Gokaran A.I.R. 1956 All. 124) and adopted by Text book writers: See Raghavachariar (1965) 685; Derrett: I.M.H.L. (1963) pr.841; Mulla (12d) 593.

In any event it must be remembered that the impartible estate is more a creature of custom and is not really J.F.P. as such. The Supreme Court has however in a recent judgement tried to stamp on it a joint family character and in a recent case suggested that the family has a right to maintenance out of the estate[26] ignoring two previous Supreme Court decisions which had ruled the contrary.[27] This was clearly an attempt by Ramaswami J. to introduce the joint family element whereas Gajendragadkar and Mahajan JJ.'s judgements (in the earlier cases) had tried to soften it. It will thus be clear from all this that the Courts, and above all the Supreme Court, are not wholly unfamiliar with the idea of a partial partition as to property, which was introduced by statute in 1928 for tax reasons. We will concern ourselves solely with the revenue situation because the Supreme Court has not yet dealt with the problem of "notional" partitions under Section 6 of the Hindu Succession Act 1956 which has created so much controversy in the Bombay High Court.[28]

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26. See Ramaswami J.'s statement in U.P. v Rajkumar (1971) 1 S.C.J. 100 102 "The right to maintenance and the right to survivorship however still remain and (it) is by reference to these rights that the property though impartible has in the eye of the law to be regarded as joint family property."

27. Contrast Mahajan J. in Chinnathayi's case A.I.R. 1952 S.C. 29 at pr.23 p.35 col.2 "The junior members of the family can neither demand partition of the estate nor can they claim maintenance as of right except on the strength of custom, nor are they entitled to possession or enjoyment of the estate." Gajendragadkar J. Pushavati Viziaram v Pushiavati Visweswar (1964) II S.C.R. 403 at 416 "Even the right to maintenance as a matter of right is not applicable as laid down in the Second Pittapur case ... 45 I.A. 148."

28. On this see the famous case of Rangubai v Laxman A.I.R. 1966 Bom. 169 and see the comments of Derrett (1970) C.M.H.L. 217 ff. Mrs. Manohar (1966) 68 Bom.L.R. 60-62. That case lays down, while considering a notional partition under the section, that the female (or someone claiming through her) in Sch.I of the Act, under the Act claims as heir and also takes absolutely her share at the supposed partition under Hindu law. The Bombay Court has gone one step further and suggested in Narayan Rao v State A.I.R. 1971 Bom. 158 that the said section requires an actual partition; see Derrett (1971) 73 Bom.L.R.J. 82-83. But this problem has not been directly considered by the Supreme Court.

The idea that a person could partition all or some of his property for tax reasons was introduced by the Income Tax Amendment Act (3 of) 1928 which introduced Section 25A to the Income Tax Act 1922, the relevant portion of which lays down :

> "25A (1) Where at the time of making an assessment under Section 23 it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition had taken place among the members of such family the Income Tax Officer shall make enquiry thereinto as he may think fit, and if he is satisfied that the joint family property has been partitioned amongst the various members or groups of members in definite portions he shall record an order to that effect provided that no such order shall be recorded until notices of the enquiry have been served on all the members of the family."

The Privy Council made it clear that what this section required was not an actual partition, but merely a division of the property into definite portions, and that a partition valid at Hindu law would be invalid for revenue purposes unless there was an actual division into definite portions.[28] Later the Madras High Court ruled that a business may be partitioned by specification of shares in the accounts.[30]

More recently the Income Tax Act 1961 recognises that joint families can partition only some of their property. Section 171 (8) (b) of the Act defines "partial partition" as

> "a partition which is partial as regards the persons constituting the Hindu individed family, or the properties belonging to the Hindu undivided family or both."

How has the Supreme Court reacted to these revenue problems ? Have they looked at the problem solely from the revenue point of view or

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29. Sir Sundar Singh v I.T.Commr. A.I.R. 1942 P.C. 57; See also the Privy Council decision of Lachman Das v C.I.T. A.I.R. 1948 P.C. 8. For the Income Tax approach see Kanga and Palkivala: The law and practice of Income Tax (1969 Edn.) 848-859.

30. See Meyappa v I.T.Commr. A.I.R. 1951 Mad. 506 (partition by entry into books) Davayya & Sons v I.T.Commr. A.I.R. 1953 Mad. 315.

have they accepted the criteria of Hindu law ? And, if so, to what extent have they used traditional concepts to deal with these modern problems ?

One of the first problems that the Supreme Court faced was whether when a joint family firm joins a partnership all the co-parcener's family became members of the partnership. If this argument were accepted the joint family would practically cease to exist as a business institution and the members would be severally liable to the extent of their share for the liabilities of the partnership. In Firm Bhagat Ram v E. P. T. Commr.[31] T. L. V. Ayyar J. (himself a reknowned Hindu lawyer) took up a traditional standpoint and observed :

> "If members of a coparcenery are to be regarded as partners in a firm with strangers, they would also become under the partnership partners inter se, and it would cut at the very root of the notion of the joint undivided family to hold that with reference to coparcenery property can at the same time be both coparceners as well as partners." 32

In this particular case the question was whether tax relief given to a joint family firm showing loss could be taken away if there was a partition and the firm reconstituted as a partnership, on the grounds that the persons constituting the firm had changed. The Court held that the persons constituting the firm had changed.

But this principle has also worked in favour of the joint family. Thus in the recent case of Agarwal & Co. v I.T. Commr.[33] Hegde J. held that a partnership did not have to register as a company because the total number of members (including the coparceners in the joint family) exceeded the statutory maximum. This insistence on Hindu

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31. A.I.R. 1956 S.C. 374.

32. Ibid at pr.7 p.377-8.

33. A.I.R. 1970 S.C. 1343 see also C.I.T. v Nand Lal A.I.R. 1960 S.C. 1147; C.I.T. v Baxalakshmi & Co. A.I.R. 1965 S.C. 1708.

law techniques rather than lifting the veil of the partnership for tax and other purposes[34] reflects on the capacity of the Court to preserve Hindu law attitudes in complex secular situations.

This contrasts with the attitude of the Privy Council which had treated the problem of partition under the Income Tax Act 1922 from the tax rather than the Hindu law point of view.[35] Indeed, this approach filtered through to the Supreme Court in Charandas Haridass v I. T. Commr;[36] but here the Court also justified their stand on the ground that it was consistent with the principles of Hindu law. The question arose whether partitioning certain incomes from certain partnerships was a sufficient partition to comply with terms of Section 25A of the Act. The Bombay High Court thought that it did not but their decision was reversed by the Supreme Court on the grounds that :

> "(t)here is nothing in the Indian Income Tax law or the law of partnership which prevents members of a Hindu joint family from dividing any asset. Such division must, of course, be effective so as to bind the members; but Hindu law does not further require that the property must in every case be partitioned by metes and bounds, if separate enjoyment can otherwise be secured according to the shares of the members. For an asset of this kind there was no other mode of partition open to the parties if they wished to retain the property and yet hold it jointly but in severalty, and the law does not contemplate that a person should do the impossible ..."[37]

The Court in an attempt to justify "income tax partition" on traditional grounds, clearly fused two doctrines into one, i.e. the income tax view that a person can divide some property for income tax reasons and yet remain joint as a family with Hindu law notions that the law does not enjoin the partition of what is by its very nature impartible. A

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34. This is a typical technique used in England (see Gower: Principles of Modern Company Law (1969 3d.) Chapter 10 pp.189-217. See particularly the tax attitude at p.200) as well as in India.

35. See supra f.n.29.

36. (1960) 62 Bom.L.R. 663.

37. Ibid at 666.

foreign observer was alarmed by this statement and pointed out that :

> "there is a danger that it may be believed that a joint Hindu family can partition a business or partnership share or indeed any similar single source of profit, like a debenture by merely entering into an agreement to receive the income in fixed shares ... The fact is that is impossible ... The śāstra is however consistent with common sense, and must therefore be followed." 38

We have already seen above that traditional Hindu law accepted the need to recognise some kinds of partial partition. But it is also true that if the principle were taken beyond the confines of the limits set by the śāstra (i.e. what is impossible to partition or is not available at the time should either not be partitioned by sale and distribution of proceeds, or should be allotted undivided subject to an owelty) the joint family itself would be fragmented.[39] The Supreme Court have clearly made an attempt to introduce a modernising principle into the joint family dressed up in traditional notions and at the expense of the revenue. Some attempt must be made to determine clearly the extent to which we might allow the principle of tax partition (clearly a form of tax avoidance) to become a permanent feature of Hindu law. The Court has not displayed a consistent attitude on this and in I. T. O. v Bachu Lal Kapur[40] Subba Rao J. was prepared to accept an argument from the revenue that the partition was in fact a make-believe one.

> "The case of the revenue was that the compromise was a make believe one and the family in fact continued to be a joint family. If the case of the revenue was true and the fact of the continuance of the joint Hindu family was kept back from the knowledge of the Income tax officer, it would be a clear case of the said family escaping assessment during the relevant year." 41

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38. Derrett: Recent Decisions in Hindu Law (1961) 63 Bom.L.R. 1-8,17-23 at19

39. The Mitakshara joint family would then gradually cease to have any assets which would all be held in severalty. This aspect of the matter is discussed very well with Derrett with all the ancient texts in the article cited f.n.38 at 17-23.

40. (1967) I S.C.W.R. 14.

41. Ibid at p.20.

Some balance must be found between the Income Tax view about tax evasion, the Hindu law view which discourages partial partition and the belief underlying the Act that since partition is constantly alleged to support the non-applicability of provisions discriminating against the joint family, some regular method of proof of partition must be laid down. It would have been possible for the Supreme Court to have ignored partial partition and insisted that only separation of status (and conversion of all assets into tenancies-in-common) would qualify for proof of a partition. Though the Supreme Court has made partial partitions easier without going into the complicated śāstric rules which demand a delicate consideration of the problem, its introduction of the impossibility rule (the item must be partitioned in definite portions unless it is impossible or inconvenient to do so) is really a use of Hindu law rule adapted to a tax situation and closer attention must be paid to it. It is a pity that the judgement is relatively free of authority.

Extremely clear examples of the Court's having chosen to follow Hindu law rather than revenue techniques have been two important cases on whether a "blending" of S.A.P. into J.F.P. followed by a partition is a transfer for revenue purposes. The situations arose because a coparcener blended his S.A.P. into the hotch potch and then claimed a partition with the result that he had in fact (though not in law) made a transfer of his property to the other coparceners.[42]

The Supreme Court first considered the problem from the point of view of Section 16 (3)(a) iii of the Income Tax Act 1922[43] in

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42. Vallabhdas: Does throwing separate property into hotch potch amount to transfer? A.I.R. 1969 Jnl. 27; V.Seturaman: Theory of blending and an empty H.U.F. hotch potch A.I.R. 1971 Jnl. 68-73.

43. See Kanga and Palkivalla (cited f.n.29.).

C. I. T. v Keshavalal[44] Sikri J., reading the judgement on behalf of Subba Rao and Shah JJ., construed the statute strictly and following an early High Court judgement of Subba Rao J. held that the transaction was not a transfer. This view was followed in another case decided by the Supreme Court in the same year, C. I. T. v M. K. Stremann.[46]

A similar problem arose in relation to the Gift Tax Act, where the revenue argument is stronger because even if the transaction was not a transfer[45] it had all the incidents of an indirect gift by one coparcener to another. Indeed this was the view taken by the Allahabad and Andhra Pradesh High Courts[47] even though the majority of the High Courts had decided the issue from the joint family point of view.[48] The matter came to be considered by Hegde J. in Goli Eswariah v C. G. T.[49] where his lordship dissented from Andhra Pradesh (from where this appeal had originated) and took the strict Mitakshara view that the son was a co-owner of the coparcenery property and thus could not be said to receive a gift of property that was, strictly speaking, his.[50]

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44. A.I.R. 1965 S.C. 688 where the Court distinguished the earlier case of C.I.T. v C.M.Kothari A.I.R. 1964 S.C. 331 where the father and son made presents to the daughter-in-law and the mother respectively. It was held that this was a clear case of transfer and fell within the meaning of the Section. It should be noted that in this case the birth-right of the son was not involved.

45. The cases relied were K.Subba Rao J. (as he then was) in Radha Krishnayya v Gutt Sarasamma A.I.R. 1951 Mad.213; M.K.Stremann v C.I.T. A.I.R. 1962 Mad. 26.

46. A.I.R. 1965 S.C. 1494.

47. G.V.Krishna Rao v First Addl.Tax Officer A.I.R. 1970 A.P. 126; C.G.T.v Satyanarayan Murthy A.I.R. 1965 A.P. 95; C.G.T. v Jagdish Saran (1970) 75 I.T.R. 529 (Allahabad).

48. C.G.T. v P.Rangaswami Naidu A.I.R. 1970 Mad. 441 ; V.R.S.R.M.R. Chettiar v C.G.T. Madras Case No. 10 1966 (cited in the Supreme Court case cited in f.n.49); Dr. A.R.Shukla v C.G.T. (1969) 74 I.T.L. 167 (Guj. F.B.); P.D.Subramaniya A.I.R. 1968 Ker.190; Smt.Laxmimai Narayani v C.G.T. (1967) 65 I.T.R. 19 (Mys.).

49. A.I.R. 1970 S.C. 1722.

50. Ibid at pr.5 p.1725.

But, we must not overlook the fact that the property that came to be divided was in fact ordginally the self-acquired property of the father. What the Supreme Court judgement has done in fact is virtually to give to the son an "ownership" in the self-acquired property of the father. This accords with a clear text of the Mitakshara[51] which was not accepted by the Privy Council (in a Hindu law context) in the famous case of Rao Balwant v Rani Kishori.[52] It is curious that a theory that made no headway whatever in Hindu law contexts[53] should, at this late hour, rear its head in order to save the family from paying gift tax.

A brief look at the revenue cases in the Supreme Court shows that though the Supreme Court has not relied on traditional sources alone for their views of the Hindu law, they have not left the Hindu joint family at the mercy of the tax law but in fact supported a traditional Hindu law approach. It has sometimes justified it on the basis of the English rule of interpretation of statutes that revenue statutes must be strictly construed.[54] This is our clearest example of an obvious conservatism in the Court, even in the face of a revenue situation, which clearly demands something different, if only a compromise.

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51. See the text of the Mitakshara text discussed in Chapter III Section 2.

52. 25 I.A. 54. Derrett: R.L.S.I. (1968) 417; Mayne (11d) 450.

53. G. Laxminarasamma v G. Rama Brahman (1950) Mad. 1084 (a case exploring the Mitakshara birthright thoroughly). Derrett: R.L.S.I. (1968) 300, 310.

54. See Shah J.'s judgement in C.I.T. v Keshavalal A.I.R. 1965 S.C. 866 (following P.J.Thomas v C.I.T. A.I.R. 1964 S.C. 587; C.I.T. v C.M.Kothari A.I.R. 1964 S.C. 331) at pr.9-10 pp.867-8.

iii. Communication of the intention to sever.

One of the vexed problems of Hindu law has centred upon the problem of how a coparcener communicates his intention to sever and when it can be deemed to take effect.[55]

The ancient texts, unhampered by the problem of families living apart from each other, and not faced with the task of framing rules for the contingencies like communication through the post and telegraph, laid down the extremely simple rule that all that was required was a clearly expressed declaration of intention,[56] and partition took place from the date of declaration of intention, not the date when partition by metes and bounds was completed.[57] Thus Nīlkaṇṭha says in the Vyavahāra Mayūkha :

> "Even in the absence of any common property, severance does indeed result by the mere declaration 'I am separate from thee' because severance is a particular state of mind and the declaration is merely a manifestation of this mental state." 58

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55. See Kane III H.D. 562-3; Mayne (11d) 549 ff; Derrett: Severance of interest in the Marumakkathayam tarwad' (1964) K.L.T. Jnl. 49-54; Ibid: A dictum of the Supreme Court on restitution and a decision there on partition (1964) 66 Bom.L.R. 137-145; Ibid: C.M.H.L. (1970) 154-5; K.B.Agrawal: Partition in Hindu law: Communication of the intention to separate (1964) 5 Jai.D.Jnl. 153-166.

56. See Kane III H.D. 562-3. The important texts are the Mitakshara: Sarswati Vilas: Placitum 28 (Foulkes Translation 1881); Mitramsiraf Vira Mitrodaya: II.23; Nilkanth: Vyavahra Mayukh: IV.III.1 (All these are referred to in the two Supreme Court judgements Raghavamma v Chenchamma A.I.R. 1964 S.C. 136 at pr.27 p.148, pr.28 p.149; Puttrangamma v Rangamma A.I.R. 1968 S.C. 1018 pr.4 p.1021.).

57. For an excellent example of this in the early nineteenth century case law see Josada Koonwar v Gourie Byjonath Sohae Singh (1866) VI W.R. 139 at p.141 where the texts are cited and at 142-3 where some of the earlier case law is cited.

58. For the reference and the places where this was cited by the Supreme Court see supra f.n. 56.

Anglo Hindu law followed this rule in a large number of cases[59] and made it clear that the consent of the others was not necessary to affect a partition. Later the Privy Council introduced the caveat that the intention must in fact be expressed to someone.[60] In Narayana Rao v Purushotama Rao[61] Varadchariar J. (for King J. and himself) observed :

> "It is true that the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, but none of them lays down that severance of status does not take place till after communication has been received by other coparceners."

In this case the issue was directly in point because the intention to separate was communicated through the post and the coparcener in question died before it was received. This case was followed by other decisions.[62] There are also some decisions which lay down that service of notice, though necessary, is not a condition precedent for an effective severance.[63]

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59. The early case law discussed this from a different point of view, viz. Is the consent of the other coparceners necessary to effect a partition ? On this see Kemp J. in Vato Kuer v Rowshun Singh (1867) VIII W.R. 82 at 83 col.2; Mitter J. in Deo Bunsee Kuer v Dwarkanath (1868) 10 W.R. 273; the point was concluded by Ameer Ali's judgement in Girja Bai v Sadashiv (1916) 43 I.A. 151 at 161; Haldane J. in Kawal Nain v Budh Singh (1917) 44 I.A. 159 at 161.

60. See Ameer Ali J. in Suraj Narain v Iqbal Narain (1913) 40 I.A. 40 at 45; Girja Bai v Sadashiv (1916) 43 I.A. 151 at 160-1 "Once the decision has been equivocally expressed and clearly intimated to his co-sharers his right to obtain and possess the share to which he admittedly has a title, is unimpeachable."; Sir George Lowndes in Bal Krishna v Ram Krishna A.I.R. 1931 P.C. 154; Sir John Wallis in Babu Ramasray v Radhika Devi (1936) 43 Mad.L. 172 (P.C.). These are relied on by Subba Rao J. in Raghavamma v Chenchamma A.I.R. 1964 S.C. 136 at 148-9.

61. A.I.R. 1938 Mad. 390 at 391 col.2.

62. See Indira Bai v Sivaprashad Rao A.I.R. 1953 Mad. 461 at pr.16 p.464. But note that at pr.17 p.464 Rajammannar C.J., who read the judgement of the High Court, takes care to avoid commenting on the observations in Katheesumma v Beechu (1949) II M.L.J. 268, where it was said that even the despatch of the intention was not necessary.

63. See Rama v Meenakshmi A.I.R. 1931 Mad. 278 at 241 and Katheesumma v Beechu (cited supra f.n.62).

This approach was upset by the Supreme Court's decision in Raghavamma v Chenchamma[64] which laid down that the intention to sever must be communicated and that the partition will be valid only on the date of receipt of communication, on which date it will be made to relate back to the date of declaration of intention; but "relating back" will not disturb interests which have vested in the intervening period.

This was a hard case. An unscrupulous woman charged with looking after the family estate for the benefit of the minors in the family tried to procure the whole estate for herself on the grounds that that estate had in fact been partitioned and that the partitioned share should come to her because her son had been adopted by one of the coparceners. The partition was alleged to have taken place either in 1895 or in the alternative in 1945 by a coparcener through his will in which he was alleged to have made an unambiguous declaration to sever, even though it was admitted that it was not communicated to the other coparceners. It is clear that neither the trial judge nor the High Court believed this story.[65] The High Court went further and said that the will did not contain an intention to sever.[66] This case could have been decided on the short point that the facts do not support the intention to sever; The Supreme Court does not interfere with the findings of facts by the Courts below except in the most

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64. A.I.R. 1964 S.C. 136.

65. Ibid at pr. 3 p.141 (the trial judge); at pr.4 p.141 (the High Court).

66. Ibid at pr.4 p.141. The High Court case is unreported but the Supreme Court summing up the High Court judgement observe: "The learned judge rejected the plea (of partition through the will) on two grounds namely, (1) that the will did not contain any such declaration; and (2) that if it did ... the suit as framed would not be maintainable.".

exceptional cases.[67] Indeed the Court clearly stated this rule and refused to interfere on the findings of fact on the issue of adoption.[68] But Subba Rao J. followed the unusual procedure of not even deciding the question of whether the will contained a clear and unambiguous intention to sever,[69] and moved ahead to discuss the wider question of what rules ought to be followed in such cases. Since the Court did not comment on the factual point about the intention of the testator, the Court's remarks on the whole problem are the ratio decidendi of the case rather than mere obiter dictum. This is clearly an example of the Court's using a rare opportunity to reform the law rather than concentrating on the facts of the case.

Subba Rao J. was aware that the wider consideration was not required by the facts of the case, but considers the questions because he feels that the law should be modernised.

> "The questions (raised) pose ... difficult problems for a fast changing society. What was adequate in a village polity when the doctrine was conceived and evolved can no longer meet the demands of a modern society." 70

The Court therefore in effect laid down the rules of offer and acceptance in the Indian Contract Act 1872[71] and applied them to a problem of

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67. On this see the cases cited in Chapter II Section 6 (supra).

68. A.I.R. 1964 S.C. 136 at pr.143-5. Note also pr.11 p.142 where the Court cites a lot of case law to show that the Privy Council did not as a rule interfere with decisions on facts.

69. Ibid at pr.37 p.152. His lordship having discussed the problem from a wider point of view observed "...(I)t is not necessary for us to consider the further question whether the will contained a clear and unambiguous declaration of intention ~~that~~ on the part of the testator to divide himself from the members of joint family." (emphasis mine). Surely this was the preliminary and if answered in the negative the only question which the Court had to consider.

70. Ibid at pr.33 p.151.

71. See the Indian Contract Act 1872 Sections 3-5 which lay down that the communication of intention by the promisor does not become binding on the promisee until it has reached him. Again the acceptance is not binding on the promisor until it reaches him. This is really a rule of English law. See Cheshire & Fifoot: The law of contract (1969/7d) 31-47 and particularly the case of Henthorn v Frazer (1892) 2 Ch. 27.

Hindu law while insisting all the time that the approach was one which

> "the Hindu law texts suggested and the Courts evolved by a process of reasoning as well as by a pragmatic approach ... " 72

The Court seems to have envisaged "partition" as if it were a commercial transaction between two people and treated it in that light. It seems to have overlooked that a coparcener has the right to the property in question and he is not in the process of acquiring that right.[73] Further, partition, unlike an agreement, does not require the consent of the coparceners,[74] but is a unilateral declaration by which a person translated his communal interest to become purely personal. While the Court does not go so far as to demand that the partition be by agreement it places on the coparceners the duty to follow the formal procedure required by an agreement. This, as Professor Derrett has shown, can work to his disadvantage in as much as the other members of the family can in the meantime dispose of the family property, within the limits of the Hindu law.[75]

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72. A.I.R. 1964 S.C. 136 at pr.32 p.151. Note also a similar statement at pr.27 p.146.

73. Subba Rao J. is aware of this and after quoting from the texts (see f.n.56) at pr.27 p.148 says "The Hindu law texts, therefore support the proposition that severance in status is brought about by unilateral declaration."

74. This was a burning issue in the nineteenth century. See the cases cited supra f.n.59. See further Mayne (11d) 543 where the Courts following this line of reasoning held that an agreement not to partition was invalid if it extended beyond the lifetimes of those actually consenting and bound only them.

75. See Derrett: (1964) K.L.T.Jnl. 49 at 53-4 where he takes the example of a father who disposes of his son's interest to pay for his son's debts under the rules relating to the pious obligation of the son. Under the Supreme Court's rule the alienee's vested rights will not be disturbed. In (1964) 66 Bom.L.R.Jnl. 137 at 144-5 Professor Derrett takes 7 more examples of how the property can be disposed in the intervening period.

Subba Rao J. claims that he is following a pragmatic approach suggested by the ancient texts. But the texts, by insisting that all that was required was a unilateral declaration, had in fact tried to lay down a rule that the son's right to sever should remain as far as possible unhampered by any considerations pertaining to agreement,[76] whereas Subba Rao J. attempts to protect the rights of the other coparceners and third parties on the basis of the well known rule of construction that vested interests should not be divested and clearly ignoring the fact that the doctrine of "relating back", on which he relies in the same paragraph, does precisely that.[77]

It is also submitted with respect that his lordship's attempt to show that his view was supported by earlier Courts is not warranted by those cases themselves. While it is true that earlier Courts insisted that some form of communication should take place it was not suggested that partition should take place from the date of communication.[78] In an attempt to get as much authority on his side as possible his lordship distinghishes even the earlier cases to suit his own argument even though this is not always warranted by the judgements in those cases themselves. Thus Rama v Meenakshi[79] quite clearly lays

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76. See cases cited supra f.n.59. Subba Rao J. is aware of this and at 149 col.1 commenting on Rama v Meenakshi A.I.R. 1931 Mad.278 says "The learned judge deduced this proposition from the accepted principle that the other coparceners had no choice or option in the matter."

77. A.I.R. 1964 S.C. 136 at pr.34 p.151-2. Note the observation at p.152 "Further the principle of retroactivity unless a legislative intention is clearly to the contrary, saves vested rights. As the doctrine of relating back involves retroactivity by parity of reasoning, it cannot affect vested rights." The reference to the doctrine of relating back is made at p.151. The doctrine is discussed more fully in Chapter VI (infra). Note also Subba Rao J.'s attempt to distinguish precedent on the grounds that well settled precedent should not be easily set aside (pr.29 p.150) conveniently overlooking the fact that his own judgement was going to have that effect. On the fact that this judgement changes the rule see Derrett cited supra(f.n.55.)

78. See the cases cited supra f.n. 60.

79. A.I.R. 1931 Mad. 278 at 281.

down that notice is not a condition precedent for the validity of a partition, but his lordship ignores this and distinguishes the case on the ground that the testator lived till after the date of notice.[80] Again the fact that Narayan Rao v Purshotama Rao[81] was followed in Indira Bai v Shivprasada Rao[82] is not emphasised but rather the fact that "the real basis of the decision"[83] was to be found in the fact that the letter must have been delivered before the testator died - ignoring the fact that the High Court had not decided that factual question but merely ruled there was no evidence to the contrary[84] and relied in the main on Narayana Rao's case.

Thus although an attempt is made to justify the new approach on the basis of the traditional texts and High Court decisions, this is clearly a case of hiding the fact that the Court is trying to modernise Hindu law. But during the modernising process the Court seems to have overlooked the nature of the transaction that it was considering. A partition is really a process by which an owner (in the Indian sense[85]) of joint family property intimates to other co-owners his intention to separate, rather than a commercial agreement in which, e.g., he sells his birth right for a well defined share.

Happily this strict approach was modified by the Supreme Court itself in Puttrangama v Rangamma[86] where Ramaswami J., reading

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80. A.I.R. 1964 S.C. 136 at pr.28 p.149.

81. A.I.R. 1938 Mad 390.

82. A.I.R. 1953 Mad. 245 at pr.16, p.464.

83. A.I.R. 1964 S.C. 136 at pr.29 p.150.

84. A.I.R. 1953 Mad. 461 at p.463 col.1.

85. This is discussed in Chapter III. But the best account of this may be found in Derrett: The development of the concept of property in India c. A.D. 800-1800 (1962) 64 Z.V.R. 16-130.

86. A.I.R. 1968 S.C. 1018.

the judgement of the Court, converted Subba Rao J.'s strict requirements into a common sense rule. He observed :

> "It is necessary ... that the member of the joint family seeking to separate himself must make known his intention to other members of the family from whom he seeks to separate. The process (o)f communication may, however vary in the circumstances of each particular case. It is not necessary that there should be a formal despatch to or receipt by other members of the family ... The proof of such dispatch or receipt of the communication is not essential nor its absence fatal to the severance of the status. It is of course necessary that the declaration to be effective should reach the person or persons affected by some process appropriate to the given situation and the circumstances of the particular case." 87

What is even more significant is the fact that in this case the father sent a registered letter on the 8th January, requested the post office to cancel it on the 10th, wrote plaint demanding partition on the 13th and died subsequently. The Court held that the intention to partition had in fact been made on the 8th, because

> "there was a unilateral declaration of an intention ... to divide from the joint family and there was a sufficient communication of this intention to the other coparceners and therefore in law there was in consequence a disruption of family status." 88

The Court has therefore taken note of the fact that partition can in fact be inferred from the conduct of the parties[89] and thus prevented the parties from taking advantage of a mere formality.[90]

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87. Ibid at pr.4 p.1022.

88. Ibid at pr.5 p.1023.

89. See Nārada XIII.36-43: Mit. II.12. See also Jagannātha II,504 where he comments on the following text of Brihaspati "They whose income, expenses, and wealth are separate, who reciprocally lend money at interest, and who make commercial bargain with each other, are doubtless disunited." (Text 389(3)). These lay down instances of where the law will presume that there was a partition. For an early case see Josoda Kunwar v Gouree Byjinath Singh (1866) VI W.R. 139 and note the authorities and cases cited at 141-2.

90. The father wanted to separate on 8th January to safeguard the interests of his daughters and was prevented from doing so because some interested parties tried to effect an agreement which was responsible for his writing to the post office, but which did not materialise.

Subba Rao J.'s attempt to reform the Hindu law was thus short-lived[91] and preference was given to a Hindu law view of the whole problem, rather than Subba Rao J.'s all too modern view which is at variance with the whole concept of partition and the son's rights, even though it professes to be a natural extension of the traditional law on the subject in the interests of hypothetical third parties.

iv. The minor's partition - a case of overprotection.

There has always been some controversy about the extent of protection that must be given to a minor where some friend or relative institutes a suit on his behalf.[92] Some Courts ruled that the severance was effective from the date the suit was decreed,[93] while others held that it was effective on the date of the institution of the suit, provided of course that the Court confirmed the partition.[94] Some Courts even used the doctrine of relating back and argued that the partition was effective on the date of decree but it related back to the date of the institution of the suit.[95] This matter was discussed by the Supreme Court in Pedasubbhaya v Akkamma.[96] The Court held that the

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91. But note that his idea that separation operates only from receipt of the communication (subject to relation back) stands still.

92. See Derrett: A minor's partition - a lapse in the Supreme Court A.I.R. 1960 Jnl. 78; reply by B.Dayal A.I.R. 1960 Jnl. 97 and further reply by Derrett: A.I.R. 1961 Jnl. 10. For the background to the problem see Mayne (11d.) 554-556.

93. See the judgement of Rahim and Oldfield JJ. in Chelim Chetty v Subbanna A.I.R. 1918 Mad. 379; Mears C.J. in Lalta Prashad v Shiam Singh A.I.R. 1920 All. 116 at 117 col.2; Rashid J. in Hari Singh v Britam Singh A.I.R. 1936 Lah. 504.

94. Rangasayi v Nangarathnamma (1937) 57 Mad. 95 (F.B.)

95. Wasoodew J.'s judgement in Ram Singh v Fakira A.I.R. 1939 Bom.169; Bose and Sen JJ. in Mandli Prashad v Ram Charan Lal A.I.R. 1948 Nag.1.

96. A.I.R. 1958 S.C. 1042 and note the comments of Derrett and Dayal in the articles cited supra f.n.92.

partition was effective from the date of the institution of the suit[97] and following earlier High Court case law also added that the suit would not abate on the death of the minor.[98] The decision has been generally followed.[99]

But the Supreme Court went one step further and observed :

> "Thus what brings about the severance of status is the action of the next friend in instituting the suit, the decree of the Court merely rendering it effective by deciding that what the next friend has done is for the benefit of the minor." 100

Professor Derrett has pointed out that implicit in the Court's judgement is the view that a minor, unlike any other coparcener, is not at liberty to separate simply by serving a notice on the manager "in all cases where, if the matter were to come before a Court, the latter would approve of the severance of the minor's interest."[101]

The Supreme Court adopted an approach based on the theoretical assumption that the ancient duty of the Soveriegn to protect had descended on the Court. T. L. V. Aiyar J. (reading the judgement of

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97. For the view that the suit abates see Chelimi Chetty v Subbanna A.I.R. 1918 Mad. 379. In Rangasayi v Nagarathnamma A.I.R. 1933 Mad.890 there was a difference of opinion between Venkatasubha Rao J. who thought that the suit did not abate (at p.894 col.1) and Reilly J. who thought that it did (at p.895). The matter was referred to a full Bench who ruled that it did not (see the remarks of Ramesan J. at 910 and Cornish J. at p.913 col.1).

98. A.I.R. 1958 S.C. 1042 at pr.15 p.1049-50.

99. See the Supreme Court ruling in Lakkireddi v Lakshmanna A.I.R. 1963 S.C. 1601 at pr.7 p.1603.

100. A.I.R. 1958 S.C. 1042 at pr.14 p.1049.

101. Derrett: C.M.H.L. (1970) 155. Prof. Derrett's views have the support of several High Court decisions e.g. see the judgement of Leach C.J. and Clark J. in Subbarami Reddy v Chenchuraghava Reddy A.I.R. 1945 Mad.327 at pp.328 p.91 (but see the contrary opinion of the same two judges see Kottaya v Krishna Rao A.I.R. 1945 Mad.290 at pr. 3 p.291) G.Ramakrishnayya v G.Atchutha A.I.R. 1953 Mad.146 (but it is not clear whether a suit must be filed); Ramanathan Chettiar v Narayan Chettiar A.I.R. 1955 Mad. 629 at pr. 19 p.634. None of these cases are cited by the Supreme Court. But for a contrary opinion allegedly following the opinion of the Supreme Court see B.Ayyamma v K.Kottaya A.I.R. 1960 A.P. 70 discussed Derrett: A.I.R. 1960 Jnl.78.

the Court) observed :

> "...(T)he theory is that the Sovereign as parens patriae has the power, and is indeed under a duty to protect the interests of minors and that function has devolved on the Courts. In the discharge of that function, therefore, they have the power to control all proceedings before them wherein minors are concerned ..[102]

Although Aiyar J. quotes only English authority for this proposition,[103] it is clear that the position was the same in India. Kane, summing up the situation in India, says :

> "As in Western Jurisprudence, so in India the King was looked upon as parens patriae, the protector and guardian of all minors .Gaut(ama) X.48-9 and Manu VIII.27 prescribe that the king shall protect the property of the minor until he attains majority or until he returns from his teacher's house. Medhātithi on Manu VIII.27 says that the minor's relatives like the uncles may contend that one of them is the guardian of the minor's property but it is the king who is to see that the minor's property is kept safe ... " 104

While it is true that the King's duties in this quarter were exercised by the Court of Chancery in England, it is relatively more difficult to show that this was intended in India with respect to joint family property, where the law still relies on the mechanism of the joint family to achieve the result that the family requires. The institution of a suit causes unnecessary time wastage and expense which may work adversely to the interests of the minor, if we remember that the other coparceners can effect a partition against the minor simply by serving a notice, or if all the coparceners consent to partition.[105]

The decision of the Supreme Court is justified on its facts but it has generally assumed a theoretical position which overrates the

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102. A.I.R. 1958 S.C. 1042 at pr.14 p.1043.

103. Ibid citing Halsbury Laws of England 216 pr.478.

104. Kane III H.D. 165-6.

105. See generally Mayne (11d) 544 ff; Derrett I.M.H.L. (1963) 320-2.

importance of the Courts. In an attempt to imitate the Court of Chancery in England it has not paid enough attention to the internal mechanisms of the joint family and their efficacy in achieving the desired result. The Court should remember that it is the highest Court in the land and the High Courts (as we have seen earlier[106]) have taken the view that they are bound by even an obiter dicutm of the Supreme Court. Its general theoretical approach has rightly been called "a lapse in the Supreme Court." [107]

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106. See Chapter II Section 1.

107. See Derrett: A.I.R. 1960 Jnl. 78 and the articles referred to in f.n.92.

4. Conclusion

The Supreme Court seems to have accepted that the joint family is a viable institution and that the traditional law should be applied even in modern revenue situations. Thus we can see that for ten years the Supreme Court took a very practical attitude to the problem of directors' fees, even though their technical approach to the problem was inconsistent, until Hegde J. had the courage to overrule the Privy Council obiter dicta which were responsible for all the confusion. Again, while considering problems of tax avoidance under the Gift Tax Act, the Court condoned the practice of a father gifting his property to his sons by merging his S.A.P. into the hotch potch and then effecting a partition. Ironically the latest judgement on this problem was delivered by Hegde J. who had claimed to be a reformer of Hindu law in his dissent in the Dhanwatey cases. While considering the problem of partial partitions the Supreme Court has admittedly made such partitions easier, but at the same time its approach is not totally unfounded in the traditional law.

But we can also see that the Supreme Court's approach has been far from imaginative and the Court does not seem to have made full use of the techniques available to it. There are only two real examples of reform. The first is Hegde J.'s judgement in Raj Kumar's case where he placed the law on Directors' fees on a different basis. But in fact the position will change in only the most extreme cases. Further, as we have already indicated, there were many other techniques which were available to the Court which it seems to have ignored completely. The second attempt to reform came from Subba Rao J. in Raghavamma's case. Here the learned judge tried to up-date the rules of Hindu law on the communication of the intention to sever to suit modern needs, even though he overlooked the fact that his new system

of rules were capable of intruding into some important legal principles on which the joint family was based. Though this judgement was in itself considerably modified by a later judgement, it is in itself a remarkable example of judicial decision making. In contrast to T. L. V. Aiyar J.'s judgement on the minor's partition (where the Court was inspired by the practice of Chancery Courts in England) Subba Rao J. tries to reform traditional notions at least ostensibly in their own terms. As it happens this turns out to be merely window dressing because Subba Rao J. cites the traditional tests as well as the case law based on them in an uncomfortably selective way. But what is significant is that unlike Ramaswami J. (who invariable copiously refers to the original Sanskrit texts but in most cases either distorts the traditional position[1] or simply follows the Privy Council) Subba Rao J. was able to think creatively about the traditional law. He virtually created the opportunity to reform the law, clearly foresaw all the consequences of his decision and by using the doctrine of relation back worked them out to the last detail.

It is clear that apart from these isolated instances of reform (if one can call them that) the Court has been content to follow the Privy Council view of the joint family, even though recent research has indicated that many other techniques could in fact have been used. In considering the law relating to the joint family the Supreme Court has merely played the role of a third Court of appeal, rather than that of a powerful agency responsible for

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1. For an example of this see Derrett: The want of legal history in the Supreme Court (1971) 1 M.L.J. Jnl. 39-45.

creatively and sensitively reforming the Hindu law.[2] Jurists must look to Parliament and not to the Courts for reform in this quarter. In the light of this remark the inconsistencies we have noticed in individual judge's voting patterns and the lack of comprehensive understanding of the problems hardly call for pointed attention.

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2. This is the role that Hegde J. assigns to the Court in V.D.Dhanwatey v. I.T.Commr. A.I.R. 1968 S.C. 683 at pr.31 p.696.

CHAPTER VI

Three Selected Areas of Hindu Law : "Pious Obligation", "Adoption" and "Hindu Women's Rights".

In this Chapter we shall concentrate on three areas in Hindu law. The underlying unity in the selection is that in each one of these areas we see a conflict between the theoretical approach of Hindu law (or statutes based on it) - we could call this the "book law" - and practical convenience, between what are explicitly or virtually legal fictions and the facts they seek to encompass. In its decisions on "Pious Obligation and the Antecedency Rule" (Section 1) the Court appears to have concentrated solely on practical considerations, whereas in its discussion of "Adoption and the doctrine of Relation Back" (Section 2) practical considerations have been neglected in an attempt to secure adequate and fair rights for an adopted son. A lot of legislative activity has centred upon the problem of Hindu women's rights. The Supreme Court has had to adjust the reforming attitude of the legislature and interpret the statutes so as to suit the needs of related areas in Hindu law. This will be considered in Section 3 (of this Chapter) : "The Supreme Court and the Rights of Hindu Women."

It is important to remember that in these selected areas, the Supreme Court has played a secondary part. In its decisions on Public law (Chapters III and IV) and the revenue aspects of the joint family (Chapter V) the Supreme Court, and not the High Courts, took a leading role in deciding the attitude to be adopted and the techniques to be relied on; in this Chapter we shall see that the High Courts supply the juristic techniques and jurisprudence to be applied to the problem in question, and the Supreme Court's task has consisted of making a choice between the competing alternatives put forward by the High

Courts and selecting for emphasis particular points from one or the other High Court. As a result its point of view, which must inevitably be read in conjunction with the decisions of the High Court from which it was adopted, is usually sketchy, incomplete and brief without exploring the point at issue before them completely.

1. Pious Obligation and the Antecedency Rule.[1]

(i) The Problem

Anglo-Hindu law converted the son's "liability" to pay his father's debts after the father died into a "power"[2] in the hands of the father to alienate the son's interest in the J.F.P. Courts in British India did not want this power of alienation to be unlimited and therefore introduced the rule that the father could alienate the son's interest, not to incur fresh debts, but merely to meet already existing debts which were "antecedent" in point of fact as well as time.[3] This limitation is both necessary and proper, for to get rid of it (as one writer has suggested[4]) would be to expose the son's interest to an uncontrolled power in the hands of the father.

But the limitation is responsible for precipitating the anomalous situation that a mortgage to meet a non-antecedent debt is void, whereas an unsecured debt (which is contractual and therefore, not being an alienation, does not fall foul of the antecedency rule) is binding under the Pious Obligation (hereafter P.O.) rule. In order

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1. On Pious Obligation generally see Derrett: Indica Pietas: A current rule from remote antiquity (1969) 86 Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte, Rom.Abt.37-66 (hereafter Derrett: Indica Pietas (1969)); on the antecedency rule see Derrett: C.M.H.L. (1970) 97-101; Ibid: I.M.H.L. (1963) 275-7; Ibid: Hindu law: Mitakshara - the pious obligation and the doctrine of antecedency; The end of a prolonged controversy (1955) 13 S.C.J. 139-50; Mayne: (11d) 415-421; K.S.Mathur: The doctrine of antecedent debt in Hindu law A.I.R. 1951 Jnl. 49; R.K.Ranade: Antecedent Debt (1953) 55 Bom.L.R.Jnl. 94-102.

2. The words "power" and "liability" are used in the same sense as Hohfield: Fundamental Legal Conceptions (1928 reprinted 1964).

3. This is the rule laid down in Brij Narain v Mangla Prasad A.I.R.1924 P.C. 50 (1924) 51 I.A. 129. The requirement of antecedency was already known to Hindu law from Sahu Ramchandra v Bhup Singh L.R. 44 I.A. 126 and Nanomi v Modun L.R. 131 A.I. It was thus at least as old as 1883. See also Khalilal Rahman v Govind (1892) 20 Cal. 328, 346-7.

4. Mrs. I. Bhaumik (1969) 6 Law Quarterly 128ff

to deal with this anomaly the Supreme Court in Faqir Chand v Hansam Kuar[5] (in an attempt to protect the secured creditor) ruled that the son cannot complain that an alienation is void at the late hour of execution proceedings. In doing this the Court has practically ignored the son's interests (which are represented only notionally by the father, if he is Karta[6]) and assumed that the P.O. imposes upon the son an absolute liability and grants to the father what is virtually an absolute power of alienation. The Court observed :

> "But this distinction in procedure does not affect the pious obligation of a Hindu son to pay his father's debt. As in the case of a money decree, under a mortgage decree also the property is sold for payment of the father's debt. The father could voluntarily sell the property for payment of his debt. If there is no voluntary sale by the father, the creditor can ask the Court to do compulsorily what the father could have done voluntarily. The theory is that as the father may, in order to pay a just debt, legally sell the whole estate without suit, so his creditor may bring about such a sale by the intervention of a suit." 7

Too much emphasis is laid on the P.O. of the son, too little on the view that he is in the position (though not technically so[8]) of a surety, or better still a co-mortgagor and must be accorded rights concomitant with that position. We will attempt to show that the P.O. is more than a spiritual responsibility and that more attention must be paid to the nature of the son's liability than the Supreme Court in

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5. A.I.R. 1967 S.C. 727

6. For the importance of this see P.R.Venkataramiah: Power of representation in suits of a Hindu Joint family manager vis-à-vis the Hindu Succession Act (1964) 1 Andhra Weekly Reporter Jnl. 11.

7. A.I.R. 1967 S.C. 727 at pr.5 p.730.

8. Prof. Derrett in Suretyship in India: The classical law and its aftermath, Rec.Soc.J.Bodin XXVIII Les Sûretés personnelles (1972) Ch.XV, pp.287-319 at 293, 302-4 observed that Hindu jurists insisted that there could be no suretyship without any actual or imputed agreement: and it was this that explained their failure to recognise the Pious Obligation for what it was.

their extremely brief (but nevertheless extremely important) judgement were able to pay. It is submitted that the Supreme Court's solution, as well as that of a foreign observer who suggests that the antecedency rule should be abolished with respect to mortgages,[9] leaves too much power in the hands of the father (i.e. gives him too high a credit) and seeks to protect the creditor at the expense of the son. To this we shall return later.

(ii) P. O. - not just a "pious obligation.[10]

a. A problem of vyavahāra not prāyaścitta.

The problem of P.O. has usually been looked at from a religious point of view. The Supreme Court in Amrit Lal v Jayanti Lal[11] observed that :

> "(t)he basis of the doctrine is ... spiritual and its sole object is to confer spiritual benefit on the father. It is not intended in any sense for the creditors."

No one will deny that the son thought it his duty to pay the father's debt to ensure that the father was not

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9. Derrett: C.M.H.L. (1970) 99. In his article in 1955 (supra f.n.1) he argued (at 149) that a personal decree ought to be obtained and that without it the debt was not binding. In C.M.H.L. he attempts a critique of the position; in 1955 he criticised a Madras decision from the point of view of stare decisis, a more limited objective. In Indica Pietas (1969) he writes of the Supreme Court solution (at p.55 - text corresponding to f.n.47) without disapproval, as a practical solution.

10. For comments on Pious Obligation generally, in addition to the reference in f.n.1., see V.B.Raju: Avyavaharika debts (1939) 41 Bom.L.R. Jnl. 25; R.K.Ranade: Avyavaharika debt - what it means ? A.I.R. 1946 Jnl. 51; L.R.Manjrekar: Avyvaharika debt (1947) 49 Bom.L.R. Jnl. 3; R.K.Ranade: Pious Obligation in Hindu law (1950) 52 Bom.L.R.Jnl.1.;Ibid: Illegal and immoral debts in Hindu law (1950) 52 Bom.L.R.Jnl. 33.

11. Per Gajendragadkar J. in A.I.R. 1960 S.C. 964 at pr.7 p.966 relying on Sat Narain v Sri Kishen A.I.R. 1936 P.C. 277 at 280. See also the comments of Derrett: Avyvaharika debts and the decision of the Supreme Court in A.I.R. 1960 S.C. 964 (1961) K.L.T.Jnl. 21. Contrast K.S.Mathur: (supra f.n.1.) 49 col.2. quoting from Seshagiri Ayyar J. in Srinivas Aiyangar v Kuppuswami Aiyangar A.I.R. 1921 Mad. 447.

"reborn a slave, a servant, a woman or a quadruped." 12 and prevent the benefit of his father's devotions from being transferred to his creditors.[13] But one must not forget that the problem of P.O. is a problem of vyavahāra not Prāyaścitta. Debt is the first of the eighteen titles of law and the debt of the son must be placed in its proper legal and proprietary context. The questions we must ask are : (1) What were the normal rules about the payment of debts ? (2) What was the property structure within the joint family and to what extent is the doctrine of P.O. simply another way of adjusting the normal rules to the fact that a large part of the father's property is jointly owned with his sons and passes (until 1956) on to them by survivorship ?

b. The normal rules about debts.

The normal rules about debts are contained in Yājñavalkya,[14] Nārada,[15] Bṛihaspati,[16] Kātyāyana,[17] and Vishṇu,[18] and lay down that the primary liability is that of the man himself, followed by the person who inherits his wealth.[19] Next comes the person who marries the debtor's widow for she too, as Nārada says, is her husband's wealth.[20] (This rule

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12. Bṛihaspati quoted in I Colebrooke's Digest (hereafter C.D.) 228; also quoted by Vasudevamurthy J. in Thimmegowda v Nyavamma A.I.R. 1954 Mys. 93 at 99; Mukerjea J. in Pannalal v Naraini A.I.R. 1952 S.C. 170 at pr.5(a) p.174.

13. As Nārada predicts would happen I,9 (S.B.E.XXXIII p.44).

14. Yājñavalkya II,51. As regards the normal rules of debts see generally Kane III H.D. 452-4.

15. IV. 21-4 (see I C.D. 272).

16. V. 52 (S.B.E. XXXIII 329).

17. Kane's Collection Verses 562 and 577 quoted I C.D. 196 and 226.

18. VI. 29-30. See also Gautama XII,140 and Karimuddin v Gobind Krishna (1909) 36 I.A. 138 at 147.

19. For the earlier case law on the subject see Mayne (11d) 431-2.

20. IV. 22.

about wives was abolished in Bombay as late as 1866 by Section 4 of the Bombay Act VII of that year). A text of Kātyāyana[21] places the son between the taker of the wealth and the one who marries the widow, and Kane points out that this refers to

> "a son who has separate and independent wealth of his own and is more wealthy than the taker of widow though he himself being disqualified did not success to (the) ancestral wealth." 22

The Vaijayanti on Vishṇu (VI.30) quotes Yājñavalkya (II.50) and Nārada (IV.23) and places after the inheritor of the wealth and the taker of the widow, the son who takes ancestral wealth followed (in order) by the sons who are married (and one assumes have children) and finally those who are not married and do not own ancestral wealth.[23]

Thus we can see that the general rule is that the primary responsibility is that of the holder of the man's assets. But there are occasional intrusions into joint family wealth and a son who possesses such wealth can also be held liable. As a last resort however the son who does not possess such wealth can also be impleaded. This intrusion into joint family property seems justified in the context of the fact that a son by birth diminishes considerably the size of a fther's interest and assets in joint family property - a point that has been made by Madhavan Pillay J. in Lakshman Perumal Nadar v Mayini Manna.[24]

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21. Text 577.

22. III H.D. 453. A marvellous reconciliation of contradictory texts !

23. For further details see Kane: III H.D. 453-4. Derrett: Indica Pietas 37 at 47 f.n.24 doubts the authenticity of this passage: "But this passage is to be found only in the India Office Library MS.1347 ... and is not genuine." Be that as it may the Vaijayanti is hardly startling and merely lays down a logical as well as common sense point of view.

24. (1945) T.L.R. 1 at 32 (F.B.)

c. The joint family nature of the property and adjusting the rules of debt to this fact.

The father's interest in J.F.P. is indubitably linked with that of the son. At partition shares are allotted per stirpes, so that the father, often the Karta, formed a separate unit with his sons. As Karta the father is given the power to alienate J.F.P. for the benefit of the family.[25] But one must not forget that the father is capable of incurring expenditure which is not for the "benefit of the family" nor "necessity" affecting the estate, but at the same time not also the result of immoral activity or frivolous expenditure. This expenditure may conceivably turn out to be for the benefit of the family for if the father dies intestate the sons will inherit his wealth; one cannot assume that his debts will always be incurred to the advantage of strangers ! Thus he was given what may be called a "debt-incurring power", which was wider than the limited power of alienation of the Karta but not so wide as to be unlimited. It is in this context that P.O. should be considered.

The fact that the power is not just based on Hindu notions of piety has been impliedly accepted by the Supreme Court in Anthonyswamy v M. R. Chinnaswamy[26] where the liability of the sons on the basis of P.O. was extended to Tamil Vannia Christians of Chittur Talak in the Kerala State. This extension seems logical for wherever a son owns property jointly with his father it seems reasonable that he should guarantee the father's debt-incurring power. It is this aspect of the matter which Krishna Iyer J. overlooked, when in

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25. See the Mitakshara I.1.27 and the brief discussion in Chapter IV supra.

26. (1970) II S.C.R. 648.

Kuttimulu v Theyyu[27] he rightly did not extend the doctrine to the Thiyyas of Ponani but added obiter that he felt that the rule relating to the P.O. itself should be abolished. The case raised a controversy the varied aspects of which can be traced elsewhere.[28]

It will also be noted that in Panna Lal v Naraini[29] the Supreme Court was able to apply the normal rules as regards the payment of debts to a situation where P.O. applied. The Court, while not disagreeing with the position that, if a suit was filed against the father after partition for a pre-partition debt, the decree could not be executed against the son and a separate suit would have to be filed, fuled that where the father dies while the suit was pending and the son is brought on the record in his place a separate suit need not be filed against the son.[30] Thus the Court treated the son as any other heir who possessed the deceased debtor's property, but allowed him to raise the questions he could have raised under the doctrine of P.O. before the executing Court.[31]

d. Limitations on the debt incurring power.

The power of the father to incur debts is not unlimited. The śāstrakāras exonerated the son from paying the following debts :-

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27. (1969) K.L.T. 963 at pr.15 p.972.

28. Krishna Iyer J.'s judgement was ciriticised by Prof. Derrett. The pious obligation of the Hindu Son - A propos of a judicial attack on the institution (1970) K.L.T.Jnl. 59 (the article was truncated by the editor who refused to reprint Indica Pietas (1969) which formed part of the typescript). Note that the reply to the Professor, while making vague allegations about the Professor's integrity as an Englishman to make certain comments that he made, does not meet the main charge that the doctrine of P.O. ought to be retained - See K.T.Harindranath: The pious obligation of a Hindu son (1971) K.L.T.Jnl. 8-9.

29. A.I.R. 1952 S.C. 170.

30. The Court disapproved of the majority view in Atul Krishna v Lala Nandanji (1935) 14 Pat. 732 (F.B.).

31. The controversy may be traced in Mulla (13d.) 325.

(1) Debts for the purchase of spirituous liquors; (2) Debts due to lust or (3) gambling; (4) Debts of unpaid fines and (5) tolls; (6) Debts for idle promises made without consideration or made under the influence of lust or wrath; (7) debts arising out of suretyship; (8) commercial and (9) Avyāvahārika debts.

We are not at present concerned with categories (1) to (7) which are discussed elsewhere.[32] Category (8) is now obsolete[33] and as Professor Derrett plausibly suggests probably included "only those debts incurred by a Brahmin in spiritually reprobated commerce."[34] The category which is capable of an extended interpretation and has given rise to some controversy is category (9) - Avyāvahārika debts.

The word "avyāvahārika" was translated by Colebrooke[35] as "opposed to good morals". This definition was accepted as accurate by the Privy Council[36] and more recently by the Supreme Court in Amrit Lal v Jayanti Lal.[37] But this definition tends to obscure the fact that the son's obligation is not simply a matter of piety and morals but also, inter alia, a problem of commerce. Thus in Chakauri Mahton v Ganga Prashad[38] Mookerjea J. defined it simply as "proper"; in

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32. On the exclusions see Kane III H.D. 446-51; Mayne (11d) 398 ff. Derrett: Indica Pietas (1969) 37 at 49-50. See also the references cited at f.n.10 supra).

33. See Acutaramayya v Ratnaji (1926) 49 Mad.211; Parthisingh v Manichand (1935) 16 Lah. 1077; Bhupatiraju v N. Pullam A.I.R. 1963 A.P. 403 at 405.

34. Derrett: Indica Pietas (1969) 37 at 47.

35. e.g. in I C.D. 211. Note also the comments of Jaganātha.

36. Hemraj v Khem Chand A.I.R. 1943 P.C. 142.

37. A.I.R. 1960 S.C. 964 at pr.8 p.966 and note the comments of Derrett (1961) K.L.T. Jnl. 21.

38. (1912) 39 Cal. 862 at 863. See also Mandlik's translation of the Vyavahara Mayukh and the Yājñavalkya Smriti Text (1880) 113; Bhattacharya: Commentaries on Hindu law (1893/2d.) 247.

another case[39] Knight J. defined it as "unusual or not sanctioned by law"; In Venugopal v Ramadhan[40] Sadasiva Iyer J. translated it as "a debt which is not supported as valid by legal arguments and on which no right can be established in the creditor's favour in a Court of Justice". The merit of these alternative definitions is that, though linguistically misleading, they treat the son's liability as a commercial liability and instead of asking the simple question : Is the debt immoral ? ask the wider question : Is the debt one for which (given the father's position and the fact that he represents the family) it would be reasonable to hold the son liable ? In this way a large number of factors can be brought into play and be raised by the son, while challenging the father's debt.

This is in line with Professor Derrett's view that the principle underlying the 9 limitations was this :

> "No debt was which was not a good debt in the dharmaśāstra sense could be extracted by the creditor from the male issue under the P.C. Those debts which were written within this list were not such that the male issue should be held to have guaranteed the ancestor." 41

While he goes on to emphasise the spiritual aspect of the list, it would not be unreasonable to use the doctrine of "avyāvahārika" so as to extend to only such debts which are unreasonable. Seen in this light, the question : Did the father try to defraud his son(as part of the question : "was the debt avyāvahārika ?") ? does not seem so unreasonable as Professor Derrett makes it out to be, in his comment

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39. Durbar v Khachar (1908) 32 Bom.348 though criticised by other Courts see Mayne (11d) 399 f.n.(o).

40. (1914) 37 Mad. 458 at 460 criticised by Mayne (11d) 399 f.n.(o). as not helpful and criticised by other Courts (cited Mayne).

41. Derrett: Indica Pietas (1969) 37 at 49-50.

on Hira Lal v Jagdish.[42] Indeed the Supreme Court seem to support a wider view of avyāvahārika in Jakati v Borkar[43] where they held that a son was liable for the debt incurred by his father owing to the latter's negligence while discharging his duties as Managing Director of a Bank. Though the decision does extend the son's liability as a surety considerably, it can be justified on the basis of the theoretical as well as practical interest that a son has in the father's earnings.

After all one must not forget that historically avyāvahārika meant what the Court would not admit, i.e. a court advised by a paṇḍit. This included even debts recognized by the dharmaśāstra in general terms but regarded by a dharma-trained legal adviser as unfit for enforcement in the case in question. However we are in fact bound by the tradition of Anglo-Hindu law, derived as it was from an imperfect understanding of the śāstra, which converted the son's position as surety to one where he has no protection against the father's caprice in general.

While the above view of avyāvahārika is speculative, its chief merit lies in the fact that the joint family is not as closely knit as it used to be and some protection must be given to the son who would still be forced to stand guarantee for his father even though he may live separately from him while remaining technically joint. But there is also a danger that this extended interpretation might make unwholesome intrusions into the nature of the obligation itself. It should not be used to put the Hindu pickpocket in the same position

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42. A.I.R. 1959 Raj. 254 and Derrett's article: Misdeeds of a manager and Pioous Obligation A.I.R. 1960 Jnl. 2-5 at pr.9 p.3.

43. A.I.R. 1959 S.C. 282.

as a Muslim or Christian one (except from the point of view of criminality)[44] for one must not forget that the Hindu father unlike his Muslim or Christian counterpart owns joint family property.

To sum up the argument so far : P. O. is really another way in which the sons tell the father :

> "Go ahead father and incur your debts; we will stand by you and pay them off provided they are not too unacceptable in terms of the traditional norms. Our shares are bound up with yours and since you are the head of the family, this is the only way in which we can stand surety for the risks that you take indirectly on our behalf. Our birthrights are of contingent value - the residue after the payment of your debts."

(iii) The son's liability converted into a father's power.

a. The position under Anglo-Hindu law.

The son's liability to pay off his father's debts soon became a power in the father to alienate his son's interest to pay the father's debts. It may have been, as Professor Derrett suggest, because of

> "a pandit's incorrect explanation of dharmarthe (for purposes of dharma) at Mit.I.1.27 as including the purposes of releasing the living father from his debts." 45

But the jump from the son paying the father's debts on his death to the son becoming a standing guarantor for his father's debt incurring power during his father's lifetime, is not a very big jump. The Śāstra in making the son and grandson more liable than the great-grandson throws a vague pointer in this direction. The śāstric position was that the son paid the capital as well as the interest on the debt, the grandson only the capital and the great-grandson only the capital if he acquired any assets.[46] Though as Professor Derrett suggests,

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44. This point is made by Derrett: Indica Pietas (1969) 37 at 50; Ibid C.M.H.L. (1970) 103. He would like to see all pickpockets in the same position.

45. Derrett: C.M.H.L. (1970) 93 f.n.10. The Mitakshara text referred to is the one which defines the Karta's power to alienate joint family property for the distress of the family, its benefit or for religious purposes.

46. See Kane III H.D. 442-3; Derrett: Indica Pietas (1969) 37 at 46 f.n.22.

these are probably only rules of limitation,[47] they stress the decreasing liability of the issue as they get more and more remote from the debt. Anglo-Hindu law extends the same principle in the opposite direction and lays down the procedural rule that all male issue are liable for the debts of the father during their father's lifetime and a decree against him would be binding against them, but that after partition or the father's death a separate suit would have to be filed against the son.[48] This, as Kane[49] has shown, is opposed to the letter of the śāstra, but it is not an altogether unhappy result if we remember that the shares of the various coparceners fluctuate considerably with every birth and death. Since a large part of property in India is J.F.P., the Courts invented two rules to enable such property to become liable for the payment of debts. The first was that the individual share of a coparcener could be attached in the execution of a decree for the debts owed by that coparcener. The second was that the shares of a male issue could be attached for the debts of the father. This latter rule was at first merely limited to attachments by the Court,[50] but later became a power in the father to alienate property for antecedent debts all over India except in Mysore till 1954.[51]

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47. Derrett: Indica Pietas (1969) 37 at 47.

48. For a résumé of the rules see Panna Lal v Naraini A.I.R. 1952 S.C. 170.

49. Kane III H.D. 450.

50. For the use of this rule by the Court see Mayne (11d) 413-5. See also the first two cases in which the Privy Council explained the Court's power to attache Girdharee Lal v Kantoo Lal (1874) 1 I.A. 321; Nanomi Babuasin v Nadan Mohun (1885) 13 I.A. 1.

51. For the old position see Channabaseva Gowda v Range Gowda A.I.R. 1951 Mys. 38. This position was later abandoned under the pressure for uniformity in Thimmegowda v Dyamma A.I.R. 1954 Mys. 93 at 101. Vasudevamurthy J. wrongly thought that he was bound by Article 141 of the Constitution to follow the Supreme Court. It is submitted that the Article applies only when the local law is in fact similar. For the position in Cochin see Virdhachalam v Chaldean Syrian Bank A.I.R. 1964 S.C. 1425.

The father's power to incur debts was thus considerably reinforced by this power to alienate. The father could thus borrow money from A, bide his time and then borrow again from A or B to repay the earlier debt, using the J.F.P. either as a security or simply selling it off. This is precisely what happened in the famous case of Brij Narain v Mangla Prashad.[52] This tremendous increase in the father's powers is well beyond either what the Smṛitikāra imagined or even any modern contractual relationship. In Brij Narain's case the Privy Council laid down five propositions, the following three of which are important for our purposes :

> "(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for the purpose of necessity;
> (2) If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for the payment of the debt.
> (3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest." 53

The problem is whether Proposition 2 can apply to mortgages for non-antecedent debts qua debts. Some of the Courts ruled that mortgages were governed by Proposition 3 and that in order to make Proposition 2 applicable a personal decree would have to be made against the father,[54] whereas other Courts laid emphasis on the fact that the mortgage was a

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52. A.I.R. 1924 P.C. 50 = (1923) 51 I.A. 129.

53. Ibid at 56 col.1. (1923) 51 I.A. 129 at 139.

54. e.g. Beaumont J. in Bharmappa v Hanmantappa A.I.R. 1943 Bom.451 (this is approved by Derrett (1955) 18 S.C.J. 139 at 149, but the Professor (as we have shown in f.n.8) appears to have changed his mind); Ganpati v Rameshwar A.I.R. 1947 Nag. 69. Both these cases are not approved of by the Supreme Court in Faqir Chand v Hukam Chand A.I.R. 1967 S.C. 727 at pr.5 p.730 "We are not inclined to confine the second proposition within such narrow limits."

security and not to apply Proposition 2 in such cases would make the secured creditor in a less advantageous position than the unsecured creditor.[55] The Supreme Court has with minor variations followed the latter approach.[56]

(iv) Is the mortgage a debt or an alienation ?

The Supreme Court's attempt to treat a mortgage as a debt rather than an alienation[57] merits further examination. For this one must look at the law of mortgages.

Before the passing of the Transfer of Property Act 1882 (hereafter T.P.A.) various kinds of local mortgages existed :

> A simple mortgage in S.58 (b) of the Act was called "Bandha kikhat" in U.P.; "Dhrista Bhandaka", "Adaimanna Pattram" or "Tanaka" in Madras; and "Taran gahan" or "Nazar gahan" in Bombay. A mortgage by conditional sale as defined in S.58(c) of the T.P.A. was called "Khat Kabala" in Bengal; "Bye-bil-wafa" in U.P. and parts of Bengal; "Gahan lagan" in Bombay and "Muddata Kriyam" or "Peruarthum" in Madras. The names given to the various kinds of usufructary mortgages were "Khai Khalasi" "Bhagbandhak" or "Bandhak nama" in Bengal; "Digyabhogam", "Swadhin", "Adhamanam", "Kanam" or "Otti" in Madras. [58]

But how did these in fact operate ? In most cases they were not valuable as securities and were invariably accompanied by a personal covenant. A description of the position before 1882 was given by Sir Griffith Evans while introducing the T.P.A.:

> "Mortgages were legislated for in Bengal as early as 1798 but as the old regulations gave a somewhat cumbrous and unsatisfactory procedure and did not cover every class of mortgage, money lenders had resorted to a simple mortgage bond consisting

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55. This is the approach taken by the Allahabad and Madras High Courts which we shall discuss later.

56. In Faqir Chand v Hukam Chand A.I.R. 1967 S.C. 727 at 730-1 the Supreme Court adopts the same approach as the Allahabad and Madras High Courts to Proposition 2 generally though they differ as regards its actual application.

57. This is implied in their judgement in Faqir Chand v Hukam Chand A.I.R. 1967 S.C. 727. But there is dicta to the contrary in Amrit Lal v Jayant Lal A.I.R. 1960 S.C. 964 at pr.21 p.971 col.2.

58. For details and case law on the early equivalents see D.F.Mulla: The Transfer of Property Act 1882 (1933 Edn.) 301.

> of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money decree and sell the mortgaged property without allowing for time for redemption. The sale being an ordinary execution sale of the right title and interest of the debtor ... " 59

This resort to personal covenant also became necessary because the Hindu law tended to produce insistence that in order that a pledge be valid there either be an acceptance or possession of the pledge by the pledgee. It was with great reluctance that the judges in Sib Chunder Ghose v Russick Chander Neogy[60] held that a pledge unaccompanied by possession was valid in Hindu law, though both Grant and Seton JJ. admitted that such mortgages were prevalent in the country.[61] Further the Courts were also reluctant to allow the creditor to sell the property in question unless the Court superintended the sale, as becomes clear from the judgement in Bhowani Churan Mitter v Joy Kishen Mitter[62] in 1847. Sir R. B. Ghose justifies this decision because of local conditions in India :

> "The mass of mortgages in this country consists of mortgages of ancestral fields by ignorant peasants to a class of people not remarkable for their scrupulousness and everyone with any experience of Indian litigation must admit the danger of arming our money lenders with a power of sale without the intervention of the Courts." 63

This too persuaded money lenders to emphasise their personal covenants rather than their securities.

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59. Quoted in H.S.Gour: The law of transfer in India (6d) p.841 pr.1339 and also referred to but not quoted by Madhavan Pillay J. in Vishwanatha Iyer v Subramaniya Iyer (1940) 30 T.L.J. 1053 at 1090.

60. (1842) Fulton 36 (for the position in the ancient Hindu law see R.B. Ghose: The law relating to mortgages (Tagore Law Lectures - hereafter Ghose) 43 and note his criticism of this case).

61. Seton J. at 39-40 and Grant J. at 68.

62. (1847) 7 S.D. 429.

63. Ghose at 19-21.

After the passing of the T.P.A. there was no doubt that a mortgage was really a contingent alienation, even though Section 69 of the Act made the Courts' intervention necessary in all cases. The Courts worked on the assumption that in actual fact a mortgage was a tremendous power of alienation on the hands of the father with concomitant advantages to the creditor. Stanley C.J. observed in Chandra Deo Singh v Mata Prashad[64]:

> "The greed which exists for the acquisition of landed property is well known. Mondy lenders are ever ready to advance money to thriftless and extravagant landowners on the security of their landed property with a view to the ultimate acquisition of (their) property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely to redeem. Then a suit is instituted on the foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. Mondy lenders are chary of making large advances to landowners on personal security."

In the same case Banerji and Richards JJ., however, treated the land merely as a collateral security.[65] Indeed most of the Courts, instead of emphasising that a mortgage was another way in which the family lost its property, chose to point out the rather obvious fact that the mortgage was nevertheless a debt.[66] This can be very misleading for, as ~~L.~~ Mukerji J. pointed out in Gajadhar Pande v Jadubir,[67]

> "(t)he pure Hindu law did not regard a loan secured on a mortgage as different from a loan without such security. It prohibited a sale or gift without justification. Under Anglo-Indian law, a mortgage came to be regarded as an alienation and hence the rule of Hindu law against an alienation by the father was applied."

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64. (1909) 31 All. 176 at 203.

65. See Banerji J. at 216. The judges also felt that an analogy with a sale was not called for - Banerji J. at 217-8; Richards J. at 233-4.

66. See for example Chidambara Mudaliar v Koothaperumal (1903) 27 Mad. 326 at 327-8 (per Boddam and Bhashyam Ayyangar JJ.); Jagdish Prashad v Hoshyar Singh (1928) 51 All. 136 at 139 (per Sulaiman A.C.J.).

67. (1924) 47 All. 122 at 126.

The fact that, after 1882, a mortgage was really an alienation is the reason why the Courts of Travancore Cochin took a different line. They were not subject to the T.P.A. But the reasons given by those Courts are far from uniform. Four cases were decided by them and no less than three distinct approaches emerge. In S. Pillai v S. Pillai[68] S. Ayyar J. (for G. Pillay and M. Pillay JJ.) thought that such mortgages were in fact antecedent. In Venkiteshwar Iyer v Chidambara Iyer[69] K. Pillai J. (for Chatfield and Thaliath JJ.) based their decision on the fact that the mortgage decree had in fact been executed (thus following the approach of the Supreme Court, though not in point of details). The approach of the Supreme Court was foreshadowed in Sanakar v Azhakappa[70] where the mortgage for non-antecedent debts could not be challenged even though the decree had not been executed. But a somewhat broader line of reasoning was followed in Vishwanatha Iyer v Subramaniya Iyer.[71] Here the hypothecation bond had in fact been executed for family necessity but Sankara Subha Iyer J. went on to explain that the law in Travancore Cochin was different because they did not follow the law of mortgages prevalent in the rest of India. He observed :

> "After the passing of the Transfer of Property Act, the element of transfer has gone into the conception of a simple mortgage, the transfer being a transfer of the right of sale but for which the transaction will only be a charge and not a mortgage. It is this basic idea which seems to be responsible for treating a mortgage on par with a sale while considering pious obligation on the part of the son. In this country there is no provision made in the Civil Procedure Code corresponding to O.34 of the ... Civil Procedure Code of 1908 ... and therefore no warrant for approximating a mortgage or hypothecation to a sale ... "

Now that the Civil Procedure Code applies to Travancore Cochin, the Courts in Kerala should follow the rest of India, but the Supreme

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68. (1902) 23 T.L.R. 8.

69. (1924) 18 T.L.J. 490 at 500.

70. (1932) 22 T.L.J. at 84 and 85-6 (per Rao and Pillai JJ.).

71. (1940) 30 T.L.J. 1053 at 1090.

Court appears to have accepted that State's position as anomalous but final in Virdhachalam v Chaldean Bank.[72] This is acceptable in the context of the background of the Travancore Cochin cases.

Thus we can see that in Indian High Courts the view that mortgages can amount to alienations has been inadvertently overlooked while considering the problem.

(v) The Supreme Court's complete neglect of the procedural protection which should be given to the son.

But even if we treat the mortgage as a contingent alienation we will see that Statute affords some protection to a co-owner (and the son must inevitably be treated as a co-owner). In 1882 this protection was to be found in Section 85 of the T.P.A. which, subject to the provisions of the Act, laid down :

> "all persons having an interest in the property comprised in a mortgage must be joined as parties in any suit under this chapter, provided the plaintiff had notice of such interest."

In 1908, the proviso was dropped, the word "shall" substituted for "must" and the section re-enacted as Order 34 r.1 of the Civil Procedure Code 1908. That section lays down :

> "Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

The only other relevant provision is Order 1 r. 9 which lays down :

> "No suit shall be defeated by reason of mis-joinder or non-joinder and the Court may in every suit deal with the matter in controversy so far as it regards the rights and interests of the parties actually before it."

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72. A.I.R. 1964 S.C. 1425 at pr.13 p.1430.

These provisions were relied upon by a Full bench of the Allahabad High Court in Bhawani Prasad v Kalu[73] where it was held that even a mortgage decree for an antecedent debt was not binding on the son who was not made a party to it. But later this approach was abandoned by all but the Calcutta High Court,[74] and the Allahabad,[75] Bombay[76] and the Madras High Courts[77] took the view that such decrees were binding on the son if the decree was executed. Some courts even went a step further and ignored these rules altogether.[78] The reason given by one of the Allahabad decisions for the disuse of the rule by the Allahabad High Court in Hori Lal v Munman[79] was that the substantive rule in Section 85 of the T.P.A. was replaced by Order 34 f.1 - a mere rule of procedure !

These cases are interesting because of three reasons. The first is that the use of Order 34 r.1 to protect the son's interest is

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73. (1895) 17 All.537 (F.B.). It was followed in Kausilla v Chandini (1900) 22 All. 377

74. Note the case: Brijnandan v Bidya Prashad (1915) 42 Cal.1068 ending a long controversy.

75. See Debi Prashad v Jia Ram (1903) 25 All. 214; Hori Lal v Munman (1912) 34 All. 549 at 554 (per Richards C.J.).

76. Chimma v Sada (1910) 12 Bom;L.R. 811.

77. Ramasamayyan v Viraswami Ayyar (1898) 21 Mad.222 foll.in Palani Goundan v Rangayya Goundan (1899) 22 Mad. 207. But see the later decision that a decree was binding anyway: Sheik Ibrahim v Rama Iyer (1912) 35 Mad. 685.

78. See the decisions of the Patna High Court in Sarda Prasad v Umeshwar Prashad A.I.R. 1963 Pat. 274 (but note that the sale in execution had taken place in this case). See also Ishar Singh v Gajadhar Prashad A.I.R. 1957 Pat. 174 (D.B.); Purmeshwar v Kishan Prashad A.I.R. 1925 Pat. 59 (per Jwala Prashad J.); Sital Prashad v Asho Singh A.I.R. 1922 Pat. 651; Hit Lal v Joboo A.I.R. 1924 Pat. 458; Jagdish v Ramchandra A.I.R. 1921 Pat. 377; Sheik Abdul v Shib Lal A.I.R. 1922 Pat. 252. (The last two decisions were by Jwala Prashad J.).

79. (1912) 34 All. 549.

now dwindling, and the second is that all these cases can only be justified on the basis of the unrealistic assumption that the father can be said to represent the son's interest. Thirdly the distinction between a decree which had been executed and one which has not is precisely the kind of distinction which was made by the Supreme Court in Faqir Chand v Hukam Chand.[80] It is submitted with respect that the Supreme Court have completely ignored the provisions of Order 34 r.1 (read with Order 1 r.9) and thus ignored also the protection that must be given to the son's interest in J.F.P.

(vi) The practical approach chosen by the Supreme Court and its limitations.

Instead of trying to give the son and the creditor adequate protection, some Courts took the path of least resistance. They brought in the pragmatic argument :"It is now too late" and refused to allow the son to complain about the non-antecedent nature of the mortgage after some part of the proceedings were over.

Three different approaches have been found by the Courts. The approach of Suleiman J. (against the dissent of Banerji J.) that if an auction sale has taken place it is too late from the point of view of the son.[81] The approach of Subba Rao J. in the Madras High Court(which view was disapproved by the Supreme Court in Faqir Chand v Hukam Chand[82]) that once execution proceedings were complete, the son was bound. Lastly we have the approach of the Supreme Court in

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80. A.I.R. 1967 S.C. 727.

81. Jagdish Prashad v Hashyar Singh A.I.R. 1928 All. 596. The rule was not applied to a case where an auction sale had not taken place: Jahan Singh v Hardat Singh (1934) 57 All. 357; Hira Lal v Puran Chand A.I.R. 1949 All. 685 (F.B.).

82. A.I.R. 1967 S.C. 727 at pr.6 p.730-1.
Abdul Hameed v Provident Investment Co. Ltd. A.I.R. 1954 Mad. 961 (F.B.).

Fagir Chand v Hukam Chand[83] (followed by the Punjab High Court[84]) that it is too late to impugn the alienation (i.e. the mortgage without antecedency) at the execution proceedings themselves. In following this approach the Supreme Court have worked on the assumption that the Proposition 2 in Brij Narain's case applies to all debts, including mortgage debts.[85]

What the Supreme Court has therefore done is in fact to apply the second proposition after making slight variations in the interpretation given to it by the Allahabad and the Madras High Courts. Instead of examining the nature of pious obligation itself the Court has treated the propositions of the Privy Council as ex cathedra and limited its techniques to interpreting its provisions. But it has not even worked out fully the approach of the Privy Council. The Court should have regarded mortgages as alienations and given full effect to the Proposition 3 and given full effect to the antecedency rule. Alternatively they could have argued, as Professor Derrett does,[86] that antecedency should not be applied to mortgages and given to the father a virtually uncontrolled power of contingent alienation. But the Court attempted to have it both ways - by pass the clear provisions of Proposition 3 and at the same time justify their decision on the basis of Proposition 2.

We should remember that in actual fact the Supreme Court,

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83. A.I.R. 1967 S.C. 727 at 731.

84. Hindustan Commercial Bank v Sohan Lal A.I.R. 1970 P & H. 67 (per D.K.Mahajan J.).

85. Supra f.n. 83.

86. Derrett C.M.H.L. (1970) 99. This argument on the basis of precedent is noted supra f.n.9.

taking an unusual step[87] of deciding an issue of fact, found that the mortgage in dispute was partly antecedent and partly justified by family necessity.[88] This therefore is another one of those occasions where the Supreme Court took it upon themselves to reform the law by obiter observations. Should not the Court have examined the nature of the pious obligation itself instead of trying to juggle with the propositions contained in Brij Narain's case ? They have assumed the negative role of trying to avoid the absurdity of a secured creditor being in a worse position than an unsecured one, rather than work out the rights of the parties.

The best solution is to follow strictly the antecedency rule in all cases. If the creditor wants to enforce his mortgage he must follow strictly the provisions of Order 34 r.1. In effect this means that a mortgage decree should not be binding against the son unless he is joined in as party and, at that stage, has the opportunity to plead the invalidity of the mortgage so far as touches his interest. The Court may however deviate from this rule under the terms of Order 1 r.9, paying due regard to the facts of the particular case before it.

We must not overlook the fact that the village money lender is still as much an institution as he was in the nineteenth century and indebtedness is rampant in the villages.[89] Any attempt to protect the creditor is in fact an attempt to protect that kind of money lender. For the son to act as guarantee for the father is one thing, to hand over his birth right to an unscrupulous money lender quite another. The Supreme Court's hastily considered obiter dicta need reconsideration.

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87. Faqir Chand v Hukam Chand A.I.R. 1967 S.C. 727 at pr.11 p.731-2. But the Court justified this on the ground that the case had carried on for 14 years and that to remand it to the trial Court to decide an issue of fact would prolong it even further.

88. Ibid at pr.11 p.732.

89. See G. Myrdal: II Asian Drama 1039-47. See also K.Subba Rao: Man and Society (1971) 69.

(vii) Another example of bias in the creditor's favour.

The Supreme Court's attempt to protect the creditor can also be seen in their decision in Amrit Lal v Jayanti Lal[90] where Gajendragadkar J., reading the judgement of the Court, held that not only must the son, alleging that a debt was avyāvahārika, prove that the debt was tainted, but also that it was tainted to the knowledge of the creditor.[91] In achieving this result the Court assumed that the basis of P.O.

> "is spiritual and its sole object is to confer spiritual benefit on the father." 92

The Court reached their conclusion on the basis of an obiter dictum of the Privy Council[93] and the extrajudicial comments of a Hindu jurist,[94] but ignored the fact that juristic opinion in general went another way,[95] and overruled in most general terms considered Madras and Allahabad[96] decisions on the subject. The Court justified their new view on the

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90. A.I.R. 1960 S.C. 964. See the very incisive comment on this by Derrett: Avyāvahārika debts and the decision of the Supreme Court in A.I.R. 1960 S.C. 964 (1961) K.L.T. 21. His criticism gets slightly modified in C.M.H.L. (1970) 106-8 where he suggests that the Supreme Court view was a slip.

91. Ibid at pr.15 p.969 col.2.

92. Ibid at pr.7 p.966 col. 2.

93. Ibid at pr.12 p.968. The Privy Council decision was Suraj Bansi Koer v Sheo Persad Singh (1878) 6 I.A. 88.

94. Ibid at pr.14 p.969 relying on K.K.Bhattacharya: The law relating to the Hindu joint family (Tagore Law Lectures) 549-50. See also H.S.Gour: Hindu Code (4d) 500.

95. See Raghavachariar (1960;4d) 320; Mulla (12d) 437. But see Mulla (13d) 329 f.n.(p.) where the editor assumes that the Supreme Court had not overruled the Madras case (infra f.n.96) and that it was "not necessary for the son to show that the immoral purpose was known to the lender." Obviously an error by Mulla's editor.

96. A.I.R. 1960 S.C. 964 at pp.970-1. The High Court cases are: P.Lakshmanaswami v T.P.T.Raghavacharyulu A.I.R. 1943 Mad. 292 (per Shastri J.). The Supreme Court distinguishes this case on the grounds that it did not apply; Maharaj Singh v Balwant Singh (1906) 28 All.508.

basis of J.E.G.C.,[97] and a text of Yājñavalkya, which states that the sources of Hindu law are wide enough to include "approved usage"[98]- thus dressing up the doctrine of stare decisis in traditional terms. But the usage in this case was by no means proven. The Court freely admit that they want to protect the bona fide alienor and suggested that the path of change lay with the legislature.[99]

Once again the Court has assumed that the basis of P.O. is religious virtue, merely followed an obiter of the Privy Council and assumed the veneer of reformism while not paying due attention to the real nature of P.O.

If the Supreme Court goes out of its way to reform the law, it should be able to take a wider view than merely to try to slot their views in a category created by the Privy Council and at the same time exonerate itself by suggesting that their view was progressive.

(viii) Conclusion

To sum up: The Supreme Court's decisions in Anthonyswamy v M. R. Chinnaswamy[100] (which applies P.O. to a Christian community), Panna Lal v Naraini[101] (which applies the normal rule of debts to P.O.) and Virdhachalam v Chaldean Bank[102] (where the Court preserves the pre-1950 law in Travancore Cochin) are quite right. Their decision in Jakati v Borkar[103] is not unacceptable, even though it does tend to

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97 Ibid at pr.19 p.970.

98. Ibid at pr.18 p.970 relying on Yājñavalkya I.7; I,343.

99. Ibid at pr.19 p.970

100. (1970) II S.C.R. 648 discussed supra p.

101. A.I.R. 1952 S.C. 170 discussed supra p.

102. A.I.R. 1964 S.C. 1425. Though one must admit they did not specifically consider this aspect of the matter.

103. A.I.R. 1959 S.C. 282 discussed supra p.

stretch the son's liability. But its decision in Faqir Chand v Hukam Chand[104] and Amrit Lal v Jayanti Lal[105] stress too much the "piety" of of the pious obligation and do not recognise P.O. for what it really is - a system of suretyship. All these decisions derive their inspiration not from an understanding of the institution of P.O. itself but rather from the obiter of Privy Council and the assumption that the son is in an indefensible position. All the judgements are very brief and overrule conflicting High Court dicta fairly casually. It is hardly surprising that all the Supreme Court decisions are in favour of the creditor. This fact alone hardly justifies them.

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104. A.I.R. 1967 S.C. 727 discussed supra generally.

105. A.I.R. 1960 S.C. 964 discussed supra generally.

2. Adoption and the doctrine of relation back.[1]

i. The problem.

The basic problem centres upon the extent to which an adopted son is adopted into the receiving family. To what extent can he inherit from all his new relatives, become a coparcener in the adopted joint family and if adopted after (and in some cases considerably after) the death of his adopted father divest persons who inherited from his parents and their relatives on the grounds that he is a preferential heir, reopen partitions and by the use of a legal fiction (the doctrine of relation back) "relate back" his adoption to the date of his father's death so as to enable him to participate in (and even question) all that happened in the intervening period.

Our primary concern is not with the prejudice against adopted children[2] but only with the legal problems that this prejudice gives rise to and in particular to the conflict between the desire to protect the adopted son's interests by the doctrine of relation back and the practical rule that "an estate once vested cannot be divested". Before we examine the nature of that conflict and the effect it had on the Hindu law of adoption, let us examine the śāstric position and the early nineteenth century positions to show that there was a fair amount of prejudice against the adopted son and juristic opinion was not even in favour of his inheriting where there was no question of an estate being divested.

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1. The best account of the Hindu law of adoption is given in Derrett: Adoption in Hindu law (1958) 60 Z.V.R. 34-90. For general accounts in Hindu law text books see Mayne (11d) 181 ff.; Mulla (13d) 478 ff; Derrett: I.M.H.L. (1963) 92 ff.; Ibid C.M.H.L. (1970) 122 ff. Articles on the doctrine of relation back are referred to later (infra f.n. 97).

2. As an example of this see the letter of Shree K.L.Kapoor, President of the Indian Centre of Publicity for National Adoptions, complaining bitterly that Indians are prejudiced against adopting Indian children, who are being adopted by foreigners. Amrita Bazar Patrika Aug.29 1971 p.6.

ii. The prejudice against the adopted son as demonstrated in the Śāstrā and in the early nineteenth century decisions.

The śāstric texts divide sons into those who were rikthabhāja (those who take the wealth of the father as well as his gotra) and those who were gotrabhājah (those who merely took the gotra). This distinction is made by Gautama and Baudhyayana.[3] Again Manu, Nāraḍa, Vasishṭha[4] divide sons into two lots of six; Dāyāda-bāndhava (those who inherit the wealth of the father and his collaterals) and adāyāda-bāndhava (those who inherit the wealth of the father only). Manu, Baudhyayana, Gautama, Brihaspati and the Brahmapuráṇa[5] place the adopted son in the first six. The Mitākharā[6] qhotes Manu and Yājñavalkya,[7] but like the Smṛiti Chandrikā[8] prefers to follow Manu in this matter. But the rest of the Smṛitikāras place the adopted son very low. Āpastamba[9] prefers to recognise only the aurasa (natural) son. Vasishṭha and Vishṇu place him eighth,[10] Yājñavalkya and Hārīta place him seventh,[11] Kauṭilya, Nārada, Śaṅkka-and-Likhita, Devala and Yama, put him ninth[12] and the Dāyabhāga relies on Devala to put him in

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3. Gautama XXX, 30-1; Baudhyayana II.2.36-7.

4. Manu IX, 158-9; Nārada (quoted) on Dāyabhāga X,7-8; Vasishṭha XVII-38.

5. See the Chart in Kane III H.D. 645; Mayne (11d) 107. Gautama:XXVII.32-3; Baudhyayana II.2.10-23; Brihaspati (quoted) II C.D. Text 337; Brahmapuráṇa (quoted) II C.D. Text 334.

6. I.XI.30-1.

7. On Yājñavalkya II,128-32.

8. Chapter X.

9. II.6.13.

10. Vasishṭha: XVII.9-12; Vishṇu: XV.1-27.

11. Yājñavalkya: II.128-32; Hārīta (quoted) II C.D. Text 331.

12. Kautilya:III.7; Nārada:XIII.45-6; Śaṅkka-and-Likhita: (quoted) II C.D. Text 332(c); Yama: II.Text 332.

the second category.[13] In Puddo Kumaree Debee v Juggut Kishore[14] the Court quoted Śrī-Kṛishṇa Tarkālaṅkāra on the Dāyabhāga and placed him fifth, where no Smṛitikāra places him.

Thus we can see that a lot of smṛiti writers were not prepared to allow him to inherit from his father's kinsmen. Jagannātha suggested that he could inherit from his paternal uncle[15]; the Mitāksharā and Kullūkabhaṭṭa on Manu[16] allow him to inherit from his uncle only if he has good qualities. Thus the first problem on Anglo-Hindu law was whether the son could inherit from his adopted relatives at all.

The nineteenth century decisions found it very difficult to get past this wall of prejudice in the texts. At first they allowed the adopted son to inherit from his father's relatives. Thus two early cases allow him to inherit from his adopted paternal uncle.[17] Later decisions allowed him to inherit from his grandfather's second cousin,[18] and his father's third cousin,[19] In Puddo Kumaree Debee v Juggut Kishore[20] Mitter J. (reading the judgement for Jackson and Macdonald JJ.) held that an adoptee should even inherit from his adopted sister's son, who belonged to another gotra. That these decisions were a little forced in the context of the texts, can be seen from the judgement of Parke J. in Sumbhoo Chunder v Naraini Debia[21] where their lordships in

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13. X,7.

14. (1879) 5 Cal. 615.

15. II C.D. 280.

16. Mitāksharā I, ii.28-34; Kullūkabhaṭṭa on Manu IX.158.

17. See Gooroo Pershad Bose v Rashbehary Ghose (1860) 1 S.D.A. 411; Lukhee Nath Roy v Shama Sundaree (1858) S.D.A. Rep. 1863.

18. Tara Mohun Bhuttacharjee v Kripa Moyee Debia (1868) 9 W.R. 423 (Lock J. for himself and Hobhouse J. had difficulty in explaining the contrary position taken by the clear text of the Dāyabhāga X,7-9).

19. Mokundo Lall Roy v Bykunt Nath Roy (1880) 6 Cal.289.

20. (1879) 5 Cal. 615 at 627 (examining the textual position).

21. (1884) 5 W.R. 100 (P.C.) at 101 col.1, his lordship admits that there is a difference of opinion amongst the pundits.

the Privy Council held that an adopted son of a full brother was to be preferred to a natural son of a half brother and relied on the Dāyabhāga for this proposition![22] Again in Gowrbullub v Juggernath Mitter it took 51 pundits to overrule the opinion of one of the pundits attached to the Court that an adoptee could inherit from his adopted grandfather.[23]

A great controversy hentred on the question whether an adoptee can inherit from his adopted mother's relatives.[24] In the early case of Gunga Maya v Kishem Kishore (1821)[25] the pundits, commenting on a hypothetical problem, stated (in what must be taken as obiter dictum) that he could not. This observation however came to be considered as authoritative and in a series of decisions of the Calcutta and Madras High Court it was generally held that an adoptee cannot inherit from his mother's relatives[26] and that they could not inherit from him.[27] This attitude was however done away with by a

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22. On the Dāyabhāga position see f.n.18 and text corresponding to f.n.13.

23. For a detailed account of the case see Macnaghten: Considerations on Hindoo law (1829) 159-166.

24. For an analysis of the problems in this area see Derrett: The relationship of a married woman to her husband's adopted son in Hindu theory and practice: A correction (1959) 61 Z.V.R. 1 to be read with the article cited f.n.1 (1958) 60 Z.V.R. 34 at 86.

25. (1821) 3 Beng. Sel. Rep. 170; Macnaghten (supra f.n.23) 76; Sarkar: Adoption in Hindu law (1888 2d 1916) 395.

26. Morun Moee v Bejoy Kishto Gossamee (1863) W.R.Sp.No.121 (F.B.) per Roberts and Sumbhoonath JJ. Note the latter's judgement trying to distinguish the earlier case law (particularly the case cited f.n.27) at 124 col.2 But see Teen Cowree & Chatterjee v Deonath Banerjee (1883) 3 W.R. 49 where Loch J. (for Seton-Karr J. and himself) that the 1821 case was obiter (at p.49). For the Madras view see the judgement of Innes and Kernan JJ. in Chinnaramakristna v Minatchi Ammal (1873) 7 M.H.C.R. 245 (relying on the Dattaka Mimamsa at p.247).

27. Gunga Pershad Roy v Brijesswaree Chowdhry (1859) Beng. S.D.A.Rep.1091.

judgement of Loch J. which held that he could inherit his mother's stridhan and where he explained that the 1821 decision was obiter.[28] This was followed by a Full Bench decision of the Allahabad High Court[29] and Mitter J.'s judgement in Uma Sunkar Moitro v Kali Komul[30] in both of which it was held that the adoptee could inherit from his maternal relatives.

Thus we can see that prejudice has existed against the son being fully incorporated into the adopting family and inheriting from his new relatives, even though the question of divesting an already vested estate did not arise in any of the situations described above, and in spite of the fact that the śāstric texts emphasise that "a sonless man goes to hell", thus emphasising the religious merit in adoption.[31]

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28. See Teen Cowree's case cited f.n.26.

29. Sham Kuar v Gangadin (1876) 1 All. 255 at 256-7 suggesting that the maternal grandfather got spiritual advantage from the adoptee. All the earlier case law is reviewed. The 1821 decision treated as obiter and the others as merely following it. Loch J.'s timely intervention is noted and approved.

30. Uma Sunkar v Kali Komul (1881) 6 Cal. 257 (F.B.) approved by the Privy Council (1883) 10 I.A. 138. All the earlier case law is reviewed in the High Court decision.

31. See Mayne (11d) 106; Derrett: (supra f.n.1.) (1958) 60 Z.V.R. 34 at 49-51 see also Ibid: C.M.H.L. (1970) 123-4 for a modern discussion of the subject.

iii. The rule against divesting and the widow's power of adoption.[32]

a.(i) The development of the law until 1954.

Anglo-Hindu law, faced with the problem of inventing a fiction which would make the adoptee the son of his adopted father even if the former had been adopted after the latter's death, tried several alternatives. Thus the Pundits pretended that the adoptee was in fact en ventre sa mère and used the fiction that the mother had been pregnant all the time.[33] Alternatively the Courts suggested the fiction of a suspension of inheritance.[34] But the first solution could not be upheld because often years elapsed between the father's death and the son's adoption. The second solution militated against the rule that an estate once vested cannot be divested - a rule so strong that the Courts did not even allow a natural son to divest an estate which his father could not inherit because of the latter's blindness.[35]

To leave the adoptee without any rights would be unjust and therefore the Courts allowed the adoptee to divest his adopting

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32. For the literature on this subject see : G.B.Dabke: Divesting an estate on adoption (1939) 41 Bom.L.R.Jnl. 41; S.Venkataraman: Theory of relation back in adoption and prior surrender (1949) I M.L.J.Jnl. 31; G.B.Dabke: Termination of the widow's power to adopt (1953) 55 Bom.L.R.Jnl. 57; K.V.V.L.Narasimhachari: Adoptive Mother (1953) II M.L.J.Jnl. 23; Derrett: Some troublesome cases in Adoption (1953) 55 BomL.R.Jnl 1; Ibid: An important development in the law of adoption (1955) 57 Bom.L.R.Jnl. 73; Ibid: Hindu Law: Adoptive Mothers: Another difficult problem for the Supreme Court (1955) 18 S.C.J. 217; Ibid: Two difficult Bombay cases in Hindu law (1956) 58 Bom.L.R.Jnl. 90 at 102-4; Ibid: Divesting: An important full Bench decision on adoption (1956) 58 Bom.L.R.Jnl. 1. Literature on divesting after the Hindu Adoption and Maintenance Act 1956 is cited infra.

33. See Ranee Kishenmunee v Raja Oddwunt Singh (1824) 3 Beng.Sel.Rep. 304.

34. See Karuna Mai v Jai Chunder Ghose (1841) 5 Beng.Sel.Rep.46.

35. Kalidos Das v Krishna Chunder Das (1869) 11 W.R.(O.T.) 11 Peackock C.J. reading the judgement of the Court reversed the judgement of Norman J.

mother[36] and her junior co-widows.[37]

But as time went on the rule against divesting took firm root and it was stated in a series of Privy Council decisions that the widow's power to adopt itself came to an end, if there were estates apart from her own, which would be divested as a result of her adoption.[38] It was discovered much later that the observations in these cases were really obiter dicta, because the decisions could have been reached on the prior point that in each one of these cases in question the widow was precluded from adopting because of the existence of another widow lower down the line.[39]

The second breakthrough came with the decisions which ruled that the divesting rule did not apply with respect to J.F.P. or certain impartible estates which technically did not vest in anyone else

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36. See the cases cited f.n.33 and 34 supr; Dhurn Das Pandey v Mst. Shama Soondurri Debiah (1883) 5 W.R. 43 (P.C.); Contrast Mst. Ruhna Debia v Furladh Dobey (1884) 7 W.R. 450. It was alleged in Ram Sooder Singh v Surbanee Dosse (1883) 22 W.R. 121 that a widow could be divested even from her predeceased natural unmarried son, but this has been doubted in Bykant Roy v Kisto Sundaree Roy (1884) 7 W.R. 392 on the grounds that in Bengal the mother was a preferential heir to the brother.

37. See Sup Chand v Rakmabai (1871) 8 B.H.C.R. (A.C.J.) 114; Rakmabai v Radhabai (1868) 5 B.H.C.R. 181 at 192; Nondakini Desi v Adinath Dey (1891) 18 Cal. 69.

38. See Mst. Bhoobun Moyee v Ram Kishore (1865) 10 M.I.A. 279 (but note that the estate had vested in a predeceased son's widow); Pudma Coomari v Court of Wards (1881) 8 I.A. 231. But the facts are a little complicated because the other heirs had relinquished in favour of the adoptee even though his adoption was found invalid because the power of adoption had come to an end); Thayammal v Venkatarammaya (1887) 14 I.A. 69 at 70 (same facts as Mst. Bhoobun Moyee's case as also in Tara Churn Chatterjee v Suresh Chunder Mookerjee (1889) 16 I.A. 166 at 173).

39. Note the observation of the Privy Council in Narendra v Sanatan A.I.R. 1933 P.C. 155 at 159 "It is at least material that in each of the other cases it was the existence of the son's widow that stood in the way of the adoption ... "

because they passed on by survivorship.[40] That this distinction, though valid, is thin can be shown in the case of the estate of the sole surviving coparcener, as we shall see later.

This was followed by three decisions of the Privy Council[41] where it was made clear that the widow's power of adoption could not be defeated by the rule against divesting and that what was important was the religious motive in adopting a son to her husband, the inheritance of property being only secondary. The Privy Council therefore went one step further and in Anant v Shankar[42] held that the adoptee could divest even a collateral's heir. This came to be reconsidered by the Supreme Court in 1954.

(ii) The Supreme Court's decision in Srinivas v Narayan.

In Srinivas v Narayan[43] the Supreme Court was called upon to decide the extent to which the doctrine of relation back would apply. T. L. V. Ayyar J., reading the judgement of the Court, observed :

> "(T)he scope of relating back is clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is absolute and sole owner of the properties or it may be fluctuating as when he is a member of a joint Hindu family in which the interest of the coparceners is

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40. See Raghunanda v Brojo Kishore (1875) 3 I.A. 154 (an impartible zamindari); Bachoo v Mankorebai (1907) 34 I.A. 107 (but note that the Court did not interfere with the dispositions made in the will of the sole surviving coparcener); Yadao v Namdeo (1921)48 I.A. 513. Note the statement in Amarendra v Sanatan A.I.R. 1933 P.C. 155 dealing with succession in a joint family that it is clear under the decisions of the Board that the vesting in another coparcener does not put an end to the power of adoption.

41. Ameer Ali J.'s judgement in Pratap Singhji v Agar Singhji (1918) 46 I.A. 97 at 106; Amarendra v Sanatan A.I.R. 1933 P.C. 155 at 158; Anant v Shankar A.I.R. 1943 P.C. 196 at 199-200.

42. See supra f.n. 41.

43. A.I.R. 1954 S.C. 379.

> liable to increase by death and decrease by birth ... The point for determination now is whether the doctrine ... can be applied (to) ... a claim made by the adopted son to the estate of a collateral. The theory on which this doctrine is based is that there should be no hiatus in the continuity of the line of the adoptive father. That, by its very nature, can apply only to him and not his collaterals." 44

This is clearly a policy decision made more necessary by the fact that in this case the adoption in question had been made 47 years after the death of the father.[45] Instead of merely stating that the Court would not allow "relation back" to cut so deeply into the rule against divesting,[46] the Court took the wider argument that the adopted son is in effect related only to the father and not to the collaterals. It must not be forgotten that a large part of the nineteenth century decisions that we have discussed above[47] rested on the fact that the son conferred spiritual benefit on relatives other than the father.[48] This is particularly true of the judgement in Sham Kuar v Gangadin[49] where it was specially made clear that the adoptee could inherit from his maternal grandfather because of the spiritual benefit he conferred on him. Thus while the actual decision of the Supreme Court is defensible, the approach of the Supreme Court is considerably wider and jeopardises the adopted son's position. Consider the following statement made by the Court :

> "The point for determination now is whether this doctrine of relation back can be applied when the claim made by the adopted son relates not to the estate of his adopted father but of a collateral. The theory on which this doctrine is based is that

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44. Ibid at pr.17 p.385 col. 1.

45. Ibid at 381. See also pr.25 p.387 col.2 where the Court takes note of this fact.

46. Ibid at pr.25 p.387-8 where they clearly state this.

47. See supra Chapter VI Section 2(ii)

48. This is seldom of high relevance in Mitākshāra cases.

49. (1876) 1 All. 255.

there should be no hiatus in the continuity of the line of the adoptive father. That, by its very nature, can apply to him and not to his collaterals." 50

It has been argued[51] that this reading of Srinivas v Narayan is unjustified and there is nothing to suggest that the Courts will prevent an adopted son from inheriting from his father's relatives if adopted during his father's lifetime. This is unexceptionable; but the judgement can be interpreted so as to have a restrictive effect as can be seen from the latest judgement of the Allahabad High Court which has taken the Supreme Court's view even further and made an obiter observation in a recent decision that a collateral includes a paternal grandfather.[52]

The Supreme Court's treatment of earlier case law also deserves comment. The Court was faced with an 1885 Privy Council decision which affirmed their view and a 1943 Privy Council decision which affirmed the 1885 decision but at the same time made a decision the ratio of which was contrary to it.[53] Ayyar J. took a very bold step[54] of overruling the 1943 decision and maintained the consistent

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50. A.I.R. 1954 S.C. 379 at pr.17 p.385 col.1 (emphasis mine).

51. By Professor Derrett commenting on the draft of this Chapter.

52. See Arjun Singh v Virendranath A.I.R. 1971 All.129 at pr.21 p.38 relying on Krishnamurthy v Dhruvraj A.I.R. 1962 S.C. 59 which had summarised the propositions contained in Srinivas v Narayan A.I.R. 1954 S.C. 379. The Allahabad decision is obviously incorrect.

53. The cases are Bhubaneshwari v Nilkomul (1885) 12 I.A. 137; Anant v Shankar A.I.R. 1943 P.C. 196.

54. See Mayne (11d) 257-8 who in fact assumes that the 1943 decision was not in fact per incuriam but affirmed the 1885 decision. The passage relied upon by Mayne's editor (at 258) is quoted by the Supreme Court A.I.R. 1954 S.C. 379 at pr.22 p.387 but the Court did not use the technique used by Mayne of trying to find a continuity but clearly dissented from the 1943 decision.

position that the Court would not allow relation back generally to defeat the rule against divesting, and stressed the Court's power to reconsider a decision of the Privy Council on merits.

> "This Court, however, is not hampered by any such limitation (of being bound by the decision of the Privy Council) and is free to consider the question on its merits. ... It is not in consonance with the principle well established in Indian jurisprudence that an inheritance could not be in abeyance and that the relation back of the right of an adopted son ... is only quoad the estate of the father." 55

This case is one of the rare examples of decision-making where the Court has made a clear policy decision in favour of a particular rule (in this case the rule against divesting) not trying to conceal the fact by pretending to take an equivocal position. This decision is a practical one and takes implied notice of the fact that a large number of adoptions are in fact made with a view to divesting.

More recently the Supreme Court has gone (in principle) even further than Srinivas v Narayan[56] and held in two important decisions that the adoptee cannot divest a statutory heir, even as regards property to which he was entitled through his deceased adoptive father. The more significant of these decisions is Punithavalli v Ramalingham[58] where Hegde J. reading the judgement for a unanimous Court held that the adoptee could not even divest his own mother if her estate had become an absolute estate under Section 14 (1) of the Hindu Succession Act 1956. Although the actual decision in this case will affect only the small number of cases where the adoption was made between June 17, 1956 (when the Hundu Succession Act took effect) and December 21, 1956

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55. A.I.R. 1954 S.C. 379 at pr.25 p.387 col.2.

56. A.I.R. 1954 S.C. 379

57. Mohan Singh v Pasupatinath A.I.R. 1969 S.C. 135 at pr.18-9 pp.143-4.

58. A.I.R. 1970 S.C. 1730. The judgement is very brief and covers only four columns. It reversed Ramalingam v Punithavalli (1964) 2 M.L.J. 571 on which see Derrett (1966) 68 Bom.L.R. Jnl. 43.

(when the Hindu Maintenance Act took effect), it makes deep intrusions into the doctrine of relation back. From these decisions it might appear that the doctrine was being abandoned by the Supreme Court. This, however, is not so, and the Supreme Court appears to have restored the doctrine in its application to sole surviving coparceners and revived it even after the Hindu Adoption and Maintenance Act 1956 despite the fact that that statute specifically contains a clause embodying a rule against divesting !

b.(i). The problem of the sole surviving coparcener[59] (hereafter S.S.C.)

The S.S.C. poses a problem because although he has ostensibly unlimited power to alienate the property and the property passes from him by succession and not by survivorship, the property is nevertheless joint family property to which the adoptee is entitled through his father.

To understand the problem we have to go back to Telang J.'s decision in Chandra v Gojarabai (1890).[60] His lordship felt that property in the hands of a S.S.C. was really his own property and if an adoption was made the property could not in fact be divested. The decision must be read with great caution because, as the Privy Council pointed out,[61] Telang J. was trying to reconcile two different lines of authority, one of which had laid down that the widow's power to

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59. For a good review of ths problem see Derrett: Divesting by an adopted son: A pressing problem for the Supreme Court (1960) I M.L.J. 27.

60. (1890) 14 Bom. 464.

61. A.I.R. 1943 P.C. 196 at 199.

adopt was itself contingent on whether an estate was divested or not. The most important point really is, when does a joint family come to an end ? Three alternative conclusions are forthcoming :

(a) when the penultimate coparcener dies;

(b) when the S.S.C. dies;

(c) when all, or any, widows capable of exercising the power of adoption die without doing so.

Telang J., and the general drift of opinion in the Bombay High Court,[62] suggested that it came to an end at (a). But to this there was a murmur of dissent from the Madras High Court which accused the Bombay High Court of treating the joint family as "a quasi corporation."[63] The controversy was closed by the Privy Council in Anant v Shankar[64] where it was held that adoption after the death of the coparcener would in fact divest.

After 1943 the Bombay High Court tried to circumvent the decision of the Privy Council. Two approaches were found. The first bit of legal acrobatics came from Chagla C.J. in Ram Chandra v Balaji[65] where it was held that although the adoptee could divest a S.S.C.'s heir he could not divest property in the hands of an heir's heir. The Mysore High Court went a step further and extended this limitation

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62. See Vasudeo v Ram Chandra (1896) 22 Bom.521. Five judges expressed their opinion but note Ranade J. following Bhoobun Moyee's case (see supra f.n.38); Gopal v Vishnu (1898) 23 Bom.250 (but it is not clear that the property was J.F.P.); Payappa v Appana (1898) 23 Bom.327; Shah A.C.J. in Shivbassappa v Nilaya (1953) 47 Bom. 110 at 113; Shivappa v Rudrappa (1953) 57 Bom.1 (a complicated case the judgements in which last 40 pages, but which affirms the Bombay cases in the light of the new Privy Council decision on which see supra f.n.41).

63. See S.Ayyar J.'s judgement in Madana Mohana v Purushottama (1915) 38 Mad. 1105 (a case on an impartible estate); Panyam v Avadhanam (1932) 55 Mad. 581 (obiter at p.590-1 that the family would be in existence even if the coparceners held a partition. But note that Madras followed the Bombay position in Adivi v Minamary (1910) 33 Mad. 228.

64. A.I.R. 1943 P.C. 196.

65. A.I.R. 1955 Bom. 291.

to property in the hands of an heir's vendee.[66] This trend has been heavily criticised by Professor Derrett.[67]

The second and more important breakthrough came as a result of a Privy Council decision in 1927.[68] It was argued that for a limited period of time the S.S.C. had complete powers of alienation without having to justify it as family necessity, and that a gift or alienation made by him could not be impugned by the S.S.C. In 1950[69] Chagla C.J. extended this to include cases of alienation by will so that we reach the anomalous situation that the adopted son can divest the heir but not the legatee ! This rather interesting piece of judicial unorthodoxy has been exposed by Professor Derrett who rightly argues that since relation back introduces the fiction that the son was alive at the time of the S.S.C.'s death, the alienation by will is invalid.[70] This second approach, suggesting that alienations by a S.S.C. cannot be questioned has been followed by the Nagpur, Mysore and, reluctantly, by the Andhra Pradesh High Courts.[71] While Mysore[72]

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66. Somasekharappa v Basappa A.I.R. 1961 Mys. 141.

67. See the comments of Derrett:(supra f.n. 32)(1956) 58 Bom.L.R.Jnl.1-13.

68. Krishnamurti v Krishnamurti (1927) 29 Bom.L.R. 969 (P.C.). For the best analysis of the case law relied upon in this case see Derrett (supra f.n.32) (1953) 55 Bom.L.R. Jnl. 1 at 2-4.

69. Narayan v Padmanabh (1950) 52 Bom.L.R. 313;

70. (Supra f;n.32) (1953) 55 Bom.L.R. Jnl. 1-6.

71. See Parashram v Shriram A.I.R. 1929 Nag. 321; Udhao v Bhaskar (1946) Nag. 425 (where Bose J. thought that the will would be in operative only if the adoptee was alive when the S.S.C. died); Potharaju v Potharaju A.I.R. 1959 A.P. 512 where relation back is given full effect (at pr.4 p.513) but precedent followed on this particular point (pr.6 p.513); for the Mysore dicta see the case cited supra f.n. 66.

72. See the decisions in N.Paramma v S.Nigappa A.I.R. 1964 Mys.217 foll. the Supreme Court and overruling the Mysore decision cited supra f.n.66 as having been superseded by the Supreme Court's view; Mahadevappa v Chana Basappa A.I.R. 1966 Mys.15. But Kalagate J. who wrote the judgement on the last mentioned case appears to have changed his mind in Ramchandra v Anasuyabai A.I.R. 1969 Mys.64 (where the alienation was by will).

and Andhra Pradesh[73] have changed their view under pressure from dicta by the Supreme Court,[74] the Bombay High Court has stuck to its view that such alienations cannot be challenged.[75]

b. (ii). The decisions of the Supreme Court.

In Srinivas v Narayan[76] the Supreme Court emphasised that an already vested estate cannot be divested, but it also accepted that the adopted son was to be fully accepted as the son of his deceased adopted father though not capable of divesting heirs of his father's collaterals. In the case of the S.S.C. these two principles conflict - and as we have already seen the Bombay High Court has chosen to emphasise the former rather than the latter. The Supreme Court too had emphasised the former principle in 1954 but by 1961 the new judges who had been appointed to the Supreme Court were determined to give the latter principle full effect.

In Krishnamurti v Dhruvaraj[77] Dayal J. (for Subba Rao J. and himself) overruled Chagla C.J.'s judgement in Ramchandra v Balaji[78] and held that an adoptee could divest the S.S.C.'s heir's heir, even though in effect this amounted to divesting a collateral's (the first heir) heir in respect of the former's J.F.P.[79] It must also be noted

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73. S.P.Subbaya v Ademma (1967) 2 And.W. 314 at 318 (per P.J.Reddy J. - now of the Supreme Court). Note that the main question was one of limitation.

74. See infra.

75. See Mahadeo v Rameshwar (1967) 70 Bom.L.R. 89; Babgonda v Namgonda A.I.R. 1968 Bom.8.

76. A.I.R. 1954 S.C. 379 discussed supra iii.a.(ii).

77. A.I.R. 1962 S.C. 59; see comment S.R.Kulkarni (1965) 67 Bom.L.R.Jnl.4.

78. A.I.R. 1955 Bom. 291; see A.I.R. 1962 S.C. 59 at 62-3.

79. A.I.R. 1962 S.C. 59 at pr.8 p.62.

that the adoptive father died in 1882 whereas the adoptee was taken in adoption in 1945.[80] The Court, following Srinivas v Narayan, made it abundantly clear that the coparcenery was in existence as long as a widow existed with an unexercised power to adopt,[81] and that

> "the estate continues to be the estate of the adoptive father in whosoever's hands it may be, that is whether in the hands of one who is the absolute owner or one who is a limited owner." 82

But it is evident from the decisions of the High Courts[83] that the Supreme Court did not explore the situation fully and consider the problem of the alienees of a S.S.C. This question was touched upon obiter by Subba Rao J. (for Dayal and Mudholkar JJ.) in Guramma v Mallappa[84] where the Court was considering relation back in the context of a posthumously born son. Subba Rao J. relying solely on decisions relating to posthumously born sons said :

> "The sole surviving member of a coparcenery has an absolute power to alienate the family property, as at the time of alienation there is no other member who has (a) joint interest in the family ... If another member was conceived in the family or inducted therein by adoption, his right to avoid the alienation will not be affected." 85

While this was relied upon by the Mysore High Court, the Bombay High Court has not paid any attention to it.[86]

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80. Ibid at pr.2 p.60. But the Court do not make much of this fact.

81. Ibid at pr.5 p.61 col.1 where the earlier case is summarised see Proposition (iii).

82. Ibid at pr.5 p.61.

83. See for example Patel J. in Mahadeo v Rameshwar (1967) 70 Bom.L.R.89 at 92-3 where both the Supreme Court decisions are construed strictly; Desai J. in Babgonda v Nemgonda A.I.R. 1963 Bom.8 at 10 which deals with the Supreme Court judgements in the same way.

84. A.I.R. 1964 S.C. 510.

85. Ibid at pr.13 p.516 col.1 relying on Avadesh Kumar v Zakaul Hasnain A.I.R. 1944 All. 243; Chandramani v Jambeswara A.I.R. 1931 Mad. 550; Bhagwat Prashad v Debi Chand A.I.R. 1942 Pat. 99. (emphasis mine).

86. See the judgement of Kalagate J. in Mahadevappa v Chana Basappa A.I.R. 1966 Mys. 15 at 16-7 where he refuses to refer to the earlier decision of the Mysore High Court in N.Paramma v S.Nijappa A.I.R. 1964 Mys. 217 (to which he was a party and which had taken a contrary view) because of the obiter of the Supreme Court.

This was followed by the obiter of Hegde J. in Punithavalli v Ramalingam.[87] He observed :

> "In fact, under the Benares School of Mitākshara rule ... the alienation effected by a sole surviving coparcener can be successfully challenged by a person adopted subsequently to the alienation. The fiction of relation back has to be given full effect by Courts and (the) consequences spelled out as if the fiction was a fact." [88]

But once again the consequences of this are not fully worked out and we are not told whether this would apply where the adoptee was adopted after the death of the S.S.C. or where the alienation was made by the S.S.C.'s heir.

To add to, if not increase, the confusion already created by the Supreme Court we have the latest pronouncement in Sitabai v Ramchandra.[89] Here the adoptee was adopted in the lifetime of the S.S.C. and no question of alienation arose. But Ramaswami J. reading the judgement of the Court went into an extended discussion on whether a coparcenary came to an end at the death of the penultimate coparcener or not. In holding that it did not[90] his lordship relied on a Privy Council case (from Ceylon)[91] and a Supreme Court decision (on a revenue point)[92] both of which strongly suggest that property in the hands of the S.S.C. ceases to be J.F.P. as soon as the S.S.C. dies. If this is so, the Supreme Court has inadvertently overruled sub silentio the view that the property retains its character as J.F.P.

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87. A.I.R. 1970 S.C. 1730

88. Ibid at pr.3 p.1731.

89. A.I.R. 1970 S.C. 343.

90. Ibid at pr.3 p.345-6

91. Att.Gen. of Ceylon v Arunachalam Chettiar (1957) A.C. 540, on which see Derrett at (1958) 60 Bom.L.R.Jnl. 161-172 and C.I.T.Madras v Veerappa Chettiar (1970) 1 S.C.W.R. 31, on the question of estate duty, which would not be payable where the property passed by survivorship.

92. Gowli Buddana v C.I.T. A.I.R. 1966 S.C. 1523.

as long as there is a widow of a predeceased coparcener in existence with an unexercised power of adoption;[93] This would have the effect of going further than even the Bombay High Court in limiting the doctrine of relation back even though the decision purports to be in favour of the adoptee's rights.

More recently in an excellent analysis by Sheth J. (for Desai J. and himself)in Bai Chanchal v Manishanker[94] we are informed that there was an obiter in Sawan Ram's case[95] which suggests that property in the hands of the S.S.C. becomes his own. This conflicts with the view in Sitabai's case and may explain why the latter does not cite the former.

The confusion was caused because in Krishnamurthy's case the Court adopted a different point of emphasis from that taken in Srinivas' case and tried to weave a consistent pattern between the two cases. While this was technically possible, it had the effect of leaving unresolved vast areas of controversy, which as we have seen from the decisions of the High Courts, could have been decided one way on the basis of Srinivas' case and another way on the basis of Krishnamurthy's case. The latest pronouncement is yet another example of a decision-making habit which does not consider fully the implications of the Supreme Court's decision. The Court, it is submitted with respect, should have considered the whole question completely in Krishnamurthy's case. It is ironical that the Court, which on many an occasion had gone on to reform the Hindu law even though the case before them did not demand a wholesale overhaul, should have neglected to reconsider

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93. See Shah J.'s judgement in C.I.T. Madras v Verrappa Chettiar (1970) I S.C.W.R. 31 which states that a joint family can continue without a male member.

94. (1971) 12 Guj. L.R. 576.

95. A.I.R. 1967 S.C. 1781

every aspect of their decisions in an area which was notoriously controversial and where the Bombay High Court had for long openly obscured and avoided the rationale of the superior courts' decisions. The decisions are at their best untidy and indicate that in personal law matters the Court is less thorough in dealing with its earlier decisions than they are in public law matters.

Years ago Professor Derrett[96] hoped that the Supreme Court would straighten out the law relating to the S.S.C. and destroy the mistaken notion that the S.S.C. is an absolute owner of the J.F.P. in his hands. The recent Supreme Court decisions can hardly be considered satisfying and have added confusion with stray obiter dicta.

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96. Derrett (1960) I M.L.J. Jnl. 27

iv. Section 12 (c) of the Hindu Adoptions and Maintenance Act 1956 and the problems created by that statute. 97.

a. The background to the problem.

Before going any further we should consider the following provisions of the Hindu Adoptions and Maintenance Act 1956 (hereafter H.A.M.A.) (with my emphasis added) :

> "S.5 (1) "No adoption shall be made after the commencement of this Act by or to a Hindu, except in accordance with the provisions contained in this Chapter ... "
>
> S.12. "An adopted child shall be deemed to be the child of his adoptive father or mother for all purposes with effect from the date of adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family: provided that :
>
> ...
>
> (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

These provisions have given rise to a great deal of controversy. The Andhra Pradesh High Court[98] took the view that since the adoption took effect from the date of adoption (Section 12) the adoption would not even "divest" J.F.P. which had passed on to other coparceners by

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97. For comments on this see: Derrett: Divesting by an adopted son: A pressing problem for the Supreme Court (1960) 1 M.L.J. Jnl. 27; S.R.Kulkarmi: The doctrine of relation back in adoption and its validity (1963) 65 Bom. L.R. Jnl. 4; N.Das: Desirability of amendments in the present law of adoption A.I.R. 1965 Jnl. 127 referred to in Subhash Misir v Thagi Misir A.I.R. 1967 All. 148 at p.150 col.1; Derrett: Adoption, Succession and the present state of Hindu law (1966) 68 Bom.L.R. Jnl. 41; Ibid: Adoption in the Joint Family: A recent decision of the Supreme Court and its limits (1968) 70 Bom.L.R. Jnl. 51; G.K.Dabke: Divesting on adoption (1968) 70 Bom.L.R. Jnl. 143; Ibid: The little word "to" in S.5(1) of the Hindu Adoption and Maintenance Act 1956 (1969) 71 Bom.L.R.Jnl. 13; B.N.Sampath: The doctrine of relation back (1970) II S.C.J. Jnl. 1; Derrett: C.M.H.L. (1970) 135-144; Ibid: Adoption and relation back: The position in 1971 (1971) 73 Bom.L.R.Jnl. 31.

98. Hanumantha v Nanumayya (1964) 1 And.W.R. 156 at 160-1 discussed Derrett: (1966) 68 Bom.L.R. Jnl. 41 at 44-45 (where he submits with regret that it is correct); Ibid: (1968) 70 Bom.L.R.Jnl. 51 at 52-3; Ibid: C.M.H.L. (1970) 138-9; Contrast Dabke: (1968) 70 Bom.L.R.Jnl. 143 at 147 (suggesting that Dr. Derrett had changed his mind). In Sawan Ram v Kalawanti A.I.R. 1967 S.C. 1761 at prs.7-8 p.1764-5 the Supreme Court disapproved of the Andhra view and overruled it.

survivorship.[99] In contrast the Bombay High Court[100] took the view that the adoptee's ties with his natural family were replaced by ties with his adopted family (Section 12) and he could divest his mother of an estate absolutely vested in her by statute. The Court ignored the proviso (Section 12 (c)) and claimed that the adoptee even became a coparcener.[101] The Madras High Court however relied on the proviso (Section 12 (c)) and gave full effect to it.[102]

Before we go any further we should also note Professor Derrett's theory that "relation back" should apply only to a case of sacramental adoption (where it can be shown that the widow has in fact adopted both to herself and to her husband)[103] and even then its effect should be limited to cases where the adoptee claims coparcenary

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99. See Hanumantha v Hanumayya (supra f.n.98) generally.

100. Ankush Narayan v Janabai (1965) 67 Bom.L.R. 864. Note the comments of H.Gujerathi: A.I.R. 1966 Jnl. 19-20; Derrett: (1966) 68 Bom.L.R. Jnl. 41 at 44; Ibid: (1968) 70 Bom.L.R.Jnl. 51 at 53; Ibid: C.M.H.L. (1970) 138, 144. This decision was approved per incuriam by the Supreme Court in Sitabai v Ramchandra A.I.R. 1970 S.C. 343 at pr.6 p.348.

101. Ibid at p.868. On the proviso see the comments at p.866. This also appears to be the view of the Allahabad High Court in Subhash Misir v Thagi Misir A.I.R. 1967 All. 148 (per Singh J.).

102. See Ramamurti J.'s judgement in Armugha Udayar v Valliammal A.I.R. 1969 Mad. 72.

103. While this aspect of the matter had been obliquely emphasised by the Supreme Court in Sawan Ram v Kalawanti A.I.R. 1967 S.C. 1761 at pr.7 p.1764-5 relying on S.5(1) of H.A.M.A. Prof. Derrett: C.M.H.L. (1970) 134 relies on the Supreme Court decision in Mohan Singh v Pasupathinath A.I.R. 1969 S.C. 135. But there is nothing in that case which suggests that distinction. It was merely pointed out that the Oudh Estates Act 1869 applied to persons of any religion and that the adoption (which could well have been sacramental) could not divest an estate vested by a statute which had secular effect (at pr.18 p.143). It was the statute that was secular (a "self contained Code") not the adoption.

property (even if in the hands of an S.S.C. or his heir or alienee) which is capable of passing by survivorship and cannot therefore be considered a case of vesting within the meansing of Section 12 (c).[104] This has been vigorously opposed by Shree Dabke, who insists the proviso be given its full effect,[105] presumably in all types of adoption, e.g. of boys of different caste, not contemplated by the śāstra.

b. The Supreme Court decisions.

We now come to the Supreme Court's decision in Sawan Ram v Kalawanti.[106] In this case A, a presumptive reversioner, challenged an alienation made by a widow, B, who had a limited estate. B adopted C during the proceedings and subsequently died. The question therefore was whether A or C was the preferential reversioner. It would certainly have been C if it could be shown that he was also adopted to his adoptive mother's husband. The Supreme Court, relying on the provisions of Section 5 (1),[107] suggested that the word "to" in that Section meant that the adoption was both by and to Hindus and observed :

> "The most common instance of adoption will naturally be that of (an) adoption by a female Hindu who is married and whose husband is dead or has ... renounced the world, or has been declared ... to be of unsound mind. In such a case, the actual adoption would be by the female Hindu ... not only to herself, but also to her husband ... " 108

Bhargava J. who read the judgement of the Court then stressed that the child would have to give up all the ties with its natural family and observed :

> "A question naturally arises (sic) what is the adoptive family of a child who is adopted by the widow ... It is well

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104. This was first put forward in (1960) 1 M.L.J. Jnl. 27. For a later statement see Derrett: C.M.H.L. (1970) 135-144; Ibid: (1971) 73 Bom.L.RR. Jnl. 31.

105. See the articles by him cited supra f.n. 97.

106. A.I.R. 1967 S.C. 1761.

107. Ibid at pr.7 p.1764-5.

108. Ibid at pr.7 p.1765.

> recognised that, after a female is married she belongs to the family of her husband. The child adopted by her must also, therefore, belong to the same family ... Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family. The right which the child had to succeed to property by virtue of being the son of his natural father in the family of his birth is replaced by similar rights in the adoptive family and, consequently he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow taking him in adoption." 109

Later the Court while discussing the Andhra Pradesh case,[110] went on to observe that the decision in that case was right (though not for the same reasons) because the provisions of Section 12 (c) would have prevented the adoptee from divesting an estate which had vested absolutely in a S.S.C.,[111] though it had earlier hinted that the son was a member of the deceased adopted father's coparcenary.[112]

This approach has been followed by the Delhi High Court in another case involving a presumptive reversioner[113](even though this case was not specifically referred to) and was generally taken by jurists to have restored the doctrine of relation back.[114] But let us

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109. Ibid at pr.8 p.1765.

110. See supra f.n. 98.

111. A.I.R. 1967 S.C. 1761 at pr. 9 p.1765.

112. Ibid at pr.7 p.1764. Note the opening words of pr.7 contradicting the Andhra Pradesh Court's suggestion that he was not a member of the coparcenary. See Derrett: C.M.H.L. (1970) 141.

113. See Duni Chand v Paras Ram A.I.R. 1970 Delhi 202 (per Khanna J. who takes the wider "relation back" view citing Sitabai v Ramchandra A.I.R. 1970 S.C. 343.

114. See Derrett: (1968) 70 Bom.L.R. Jnl. 51; Ibid: C.M.H.L. 138 ff.; Ibid: (1971) 73 Bom.L.R. Jnl. 31; B.N.Sampath: (1970) II S.C.J. 1. But note Dabke: (1968) 70 Bom.L.R. Jnl. 143; Ibid: (1969) 71 Bom.L.R.Jnl. 13 who argues (especially in the first article at p.147) that the decision is not an authority for that proposition at all and pr.9 of the judgement in Sawan Ram's case gives full effect to S.12(c).

assume that the son can be treated as the son of his deceased adoptive father, with respect to J.F.P. We are still faced with two problems : Firstly, what happens about estates that are affected by the operation of Section 6 of the Hindu Succession Act 1956 whereby the interest of a coparcener may in certain circumstances pass on to certain statutory heirs ? Can the adoptee (a) divest his adopting mother of the estate she received under that section ? (b) divest a portion of the estate from successors to any other coparcener who may have died in the meanwhile ? (c) claim to be a member of the coparcenary ? and (d) reopen a partition ?

Secondly, the problem of the S.S.C. remains. Can the adoptee divest donees, alienees, heirs, and legatees of the S.S.C. ?

It would appear from the two Supreme Court judgements in Punithavalli v Ramalingam[115] and Mohan Singh v Pasupathinath[116] that even before the passing of H.A.M.A. the adoptee could not divest an estate which had been vested absolutely by a statute. It would not be unnatural to assume that after the passing of Section 12 (c) of H.A.M.A. an estate vested by Section 6 of the Hindu Succession Act 1956 is as incapable of being divested as an estate vested by Section 14 of the same Act[117] and an estate vested by the Oudh Estates Act 1869.[118] But the Supreme Court decisions in those cases can easily be confined to the statutes before them. Be that as it may, the problems of the S.S.C. and of re-opening partitions remain.

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115. A.I.R. 1970 S.C. 1730.

116. A.I.R. 1969 S.C. 135.

117. Supra f.n. 115.

118. Supra f.n. 116.

We can now turn to the decision of the Supreme Court in Kitabai v Ramchandra[119] where Ramaswami J. held that an adoptee of a pre-deceased coparcener's widow could succeed to the J.F.P. in the hands of the S.S.C. following the death of the S.S.C., having been adopted just before. This decision, which does not refer to Sawan Ram's case, could easily be confined to its facts on the grounds that no question of divesting in fact arose and all that the Supreme Court had done was to say that the adoptee was adopted to the widow's husband and could from the date of his adoption receive the advantages of being a member of that family.[120] No mention was made of challenging alienations made by the S.C.C. At first sight it appears that all his lordship was trying to do was to make clear that the Court would not tolerate a situation where the adoptee loses his old family ties without gaining new ones. But his lordship's statement on this matter is very widely phrased :

> "In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child ... the husband's brother would necessarily be the uncle of the adopted child ... (t)he daughter ... the sister of the adopted son ... (A)ll the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family." 121

This obiter, which has the effect of effecting a relationship (would it not operate for property as well as sentiment ?) between the adoptee and his adopted father's collaterals![122] was followed by a

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119. A.I.R. 1970 S.C. 343.

120. Ibid at pr.6 p.347-8 which can be interpreted to mean just this and no more if there were no peculiarities about the case, which we have mentioned below.

121. Ibid at pr.6 p.347-8 (emphasis mine)

122. This, as we have seen, was emphatically denied in Srinivas v Narayan A.I.R. 1954 S.C. 379 and Krishnamurthy v Dhruvraj A.I.R. 1962 S.C. 59.

specific approval of the Bombay decision in Ankush Narayan v Janabai[123] which had laid down that the adoptee could divest the adoptive mother of an estate which had vested in her absolutely under the terms of the Hindu Succession Act 1956.[124] Secondly, the Court did not cite Sawan Ram's case where there was an obiter dictum which clearly indicated that the adoptee would not divest a S.S.C. whose estate had become absolute. The decision of the Supreme Court is clearly unsatisfactory. What it appears to have done is this : it invented a concept of "complete incorporation" (into the adopting family) and threw out vague hints that that complete incorporation may include a revival of the doctrine of relation back. None of the details are examined, even though all Courts in India are bound by these decisions and the effect may well be to nullify the intention of Parliament to do away with the doctrine of relation back and its divesting effect. Too much emphasis has been laid on the fiction of "complete incorporation" and no consideration has been paid to the practical problems created. In fact apart from Srinivas v Narayan, where the details were clearly stated, all the subsequent decisions proceed on theoretical assumptions (sometimes expressed and sometimes implied) the implications of which are never really explained.

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123. A.I.R. 1970 S.C. 343 at pr.6 p.348. See supra f.n.100.

124. See for example Derrett: Hindu Law: Past and Present (1957, Calcutta) 66-7 which describes the considerations which weighed with the drafters of the Hindu Code (as the four statutes on Hindu law passed in 1955-6 are called).

TABLE I Showing voting judgement writing pattern in the cases on adoption.- 1954 - 1970

	1	2	3	4	5	6	7
Mukerjea	v						
Hasan	v						
Ayyar	*						
Subba Rao		v	*				
Wanchoo				v			
Dayal		*	v				
Mudholkar			v				
Shah					*	v	v
Ramaswami					v	*	
Bhargava				*			
Mitter				v	v		
Hegde							*
Grover						v	v

1 = Srinivas v Narayan A.I.R. 1954 S.C. 379.

2 = Krishnamurthy v Dhruvraj A.I.R. 1962 S.C. 59.

3 = Guramma v Mallappa A.I.R. 1964 S.C. 510.

4 = Sawan Ram v Kalawant A.I.R. 1967 S.C. 1760.

5 = Mohan Singh v Pasupathinath A.I.R. 1969 S.C. 135

6 = Sitabai v Ramachandra A.I.R. 1970 S.C. 343.

7 = Punithavalli v Ramalingam A.I.R. 1970 S.C. 1730.

v indicates participation

* indicates judgement writing

One of the reasons for the different point of emphasis in the various cases decided by the Supreme Court can be found in the fact that the bench structure of the Court in most of the cases was different. Thus a fragmented bench structure was responsible for the varying approaches in the various cases. Case 1 is separated from the other cases. Cases 2 and 3 form a separate group by themselves. The complete incorporation theory emanates from the judgements of Bhargava J. in Case 4 and Ramaswami J. in Case 6. Bhargava J. did not participate in any other case but Ramaswami J. also participated in Cases 5 and 7 which held that even before the H.A.M.A. 1956 the doctrine of relation back would not apply where an estate had been vested by statute. It is clear that he did not attempt to influence the extension of the incorporation theory in such cases. It will also be noticed that Shah J. who wrote the judgement in Case 5 and participated in Case 7 assented to Ramaswami J. in Case 6. Again Mitter J. participated in Cases 4 and 5. It is not by any means suggested that there is an inconsistency in all these cases or that Cases 5 and 7 are opposed to the rest. There is only a difference in the theoretical approach of the various judgement writers - those in Cases 5 and 7 emphasise the rule against divesting, those in Cases 4 and 6 stress the importance of incorporating the adoptee to the adopting family as completely as possible, in spite of the fact that these cases are governed by the H.A.M.A. 1956. The actual contribution of the judges cannot be readily explained on the basis of the voting pattern. But we can see that once again a fragmented bench structure and different judgement writers have created a situation where Supreme Court judgements have not paid adequate attention to precedent and consistency and created a line of authority which will create more problems than they have solved.

3. The Supreme Court and the Rights of Hindu Women.

i. The Problem

A lot has been written on the rights and status of women in Ancient India.[1] One writer has even claimed that

> "(t)he laws of Ancient India were so catholic in spirit and all embracing, (that) if they were taken in their true spirit, they can cover the entire needs of humanity." 2

While it is true that Hindu law recognised the separate property rights of women (called Stridhanam[3]) long before any other civilization,[4] the actual rights given were meagre, although the Mitāksharā tried to give an extended interpretation to them.

Despite Manu's injunction that a woman was not capable of owing property,[5] it is clear that the ancient texts allowed women to retain possession of ornaments and gifts,[6] which because of their very

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1. See Derrett: The legal status of women in India from the most ancient times to the present day (1959) XI Recueiles de la Société Jean Bodin 237-67; Shakuntala Rao Shastri: Women in Sacred Laws (1950); A.L.Basham: The wonder that was India (1954 London) Chapter V; J.R.Gharpure: Rights of Women under the Hindu law (1943 Bombay); C.Badet: Women in Ancient India (1925 London); A.S.Altekar: The position of women in Hindu civilization (1938) Benares - 2nd edn. 1956); Goroodas Banerjee: The law of marriage and Stridhan (1923 Calcutta).

2. Shakuntala Rao Shastri (supra f.n.1.) 193.

3. The best discussion is in Kane III H.D. Chapter XXX; See G.Banerjee: (supra f.n.1); P.W.Rege: The Law of Stridhana ... (SOAS No.327 unpublished Ph.D dissertation London 1960); Mayne (11d) Chapter XVI.

4. See Kane III H.D. 770 (quoting G.Banerjee supra f.n.1); Sir H. Maine: Early History of Institutions (1875, John Murray, London) 321-4.

5. See Manu VIII 416.

6. See generally Manu: IX,194;IX,200; Narada XIII,8; Vishnu: XVII,18; XVII,22; Katyayana: quoted II C.D. 462, 464-6, 468, 470, 475, and also see the comments on Katyayana's text: Mitāksharā; II.xi.5; Kullūkabhaṭṭa on Manu IX,194; Smṛiti Chandrikā: IX,1-2; Vyavahara Mayukh IV,X.3; but note also the restrictive interpretation of Dāyabhāga IV.1.5-6; Daya Krishna Sangrah II.II.8-9 giving a restrictive interpretation to the texts relating to the presents that a bride received when she leaves her father's house; Devala: quoted II C.D. 478 (p.597); Vyasa: quoted II C.D. 471 (at p.592); Yājñavalkya: II.43-4. See generally Kane III H.D. 770-778; Mayne (11d) 723-728.

nature passed on to females after their death.[7] The Mitāksharā tried to extend the categories of stridhanam by ingeniously suggesting that the property which a woman acquired by inheritance or as a share at partition should also be her own property.[8] But this interpretation was not accepted by the Privy Council.[9]

This in turn led to a number of statutes in favour of women, like the Hindu Law of Inheritance (Amendment) Act 1929 (which placed women in a better position to inherit from their relatives)[10], the Hindu Women's Rights to Property Act 1937 (hereafter H.W.R.P.A. - which gave them a limited estate (i.e. in effect a life estate in their husband's share in J.F.P. with a right to demand partition[11]), the Hindu Succession Act 1956 (hereafter H.S.A. - which made any property "possessed" by a female at the commencement of the Act hers absolutely[12] and by Section 6 of the Act enforced a notional partition on the death of a coparcener and gave to women and certain persons claiming through them his share of the J.F.P.[13]). Courts have been given the task of trying to

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7. See Kane III H.D. 771 "It appears from these ancient passages that the properties, which in early days were held to women presents at the time of marriage (such as ornaments and costly dresses) and household articles that are generally under the control of women and that the later Smṛiti rules about the devolution of stridhana in the female line arose from the peculiar nature of the articles over which dominion was conceded to women."

8. See the Mitāksharā on Yājñavalkya II,XI,9.26. See the comments of Kane III H.D. 780-782; Mayne (11d) 728-9.

9. On inheritance see Sheo Shandar Dayal v Debi Sahai (1903) 30 I.A. 202; but note that the position in the Bombay presidency was that such property was her stridhana in certain cases; Balwantrai v Bajirao (1920) 47 I.A. 213; on partition see Debi Mangal Prasad v Mahadeo Prasad (1912) 39 I.A. 121. See Mayne (11d) 729-33.

10. See S.2 of the Act 1929.

11. See S. 3(3) of the Act.

12. See S.14 of the Act (discussed infra).

13. There is a lot of case law and extrajudicial comment on this (see supra p443 f.n.28). But since the problem has not reached the Supreme Court it is not necessary for us to consider it further.

protect women's rights and at the same time ensure that the rights of others affected thereby are not adversely affected. The basic problem: to what extent can the Courts, relying on the spirit of reform and the desire to protect the rights of women, extend these rights ? Bearing in mind the fact that these reforms represent, in spirit if not in form, the Mitākharā attitude, let us turn to the performance of the Supreme Court.

ii. A résumé of the Supreme Court cases on the subject.

The Supreme Court has decided forty-two important decisions on the rights of Hindu women. Two were on the rights of women to inherit a shebaitship,[14] two on the construction of maintenance and gift deeds,[15] three on alienations by a widow,[16] three on the power of the Karta-manager to make gifts of J.F.P. to female members of the family,[17] one on accretions to a widow's estate,[18] five on the widow surrendering her widow's estate to the reversioner,[19] one on the customary rights of a Jain widow to her share on partition,[20] three

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14. Angurbala v Debabrata A.I.R. 1951 S.C. 293; followed in Kalipada v Palani Bali A.I.R. 1953 S.C. 125 (the main question on a point of limitation). On what a "Shebaiti" is see Derrett: I.M.H.L. (1963) 499-501.

15. Ram Gopal v Rand Lal A.I.R. 1951 S.C. 139; See also the construction of a gift deed in Nathulal v Doorga Prashad A.I.R. 1954 S.C. 365.

16. Kalishanker Das v Dhirendra A.I.R. 1954 S.C. 505; T.V.R.S.C.F. Charities v Raghava A.I.R. 1961 S.C. 797; Jaisri v Raj Dewan A.I.R. 1962 S.C. 83.

17. Kamala Devi v Bachulal Gupta A.I.R. 1957 S.C. 434; Guramma v Mallappa A.I.R. 1964 S.C. 510; A.Perumalakkal v Kumarsen A.I.R. 1967 S.C. 569.

18. Sitaji v Bijendra Narain A.I.R. 1954 S.C. 601.

19. Natvarlal v Dadubhai A.I.R. 1954 S.C. 61; Gopal Singh v Ujagir Singh A.I.R. 1954 S.C. 579; Kamlabai v Sheo Shankar Dayal A.I.R. 1958 S.C. 914; Jai Kuar v Sher Singh A.I.R. 1960 S.C. 1118; Mallesappa v Mallappa A.I.R. 1961 S.C. 1268.

20. Phoolchand v Gopal Lal A.I.R. 1967 S.C. 1470.

on the 1929 Act,[21] three on the H.W.R.P.A.,[22] eight on Section 14 of the H S.A.,[23] four on various other statutes,[24] one on partition by co-widows,[25] and one on whether a widow can be a Karta of a joint family.[26]

In the main the Court has supported the rights of women. Significant amongst its decisions[27] are: the cases recognising the shebaiti rights of women,[28] the cases which held that grants to women will be treated as absolute unless shown to be limited,[29] the decision in Sitaji v Bijendra Narain[30] where it was held that accretions to a widow's limited estate belong to her unless blended with the rest of the property; the decisions on the 1929 Act and in particular the decision

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21. Ujagir Singh v Mst. Jeo A.I.R. 1959 S.C. 1041; C.Sethurayar v Arumanayakam A.I.R. 1969 S.C. 569 (note that this case follows Angurbala v Debarata (supra f.n.14) which was also on the 1929 Act); Fateh Bibi v Charan Das A.I.R. 1970 S.C. 789.

22. Lakshmi Perumallu v Krishna A.I.R. 1965 S.C. 825; Satrughan v Sabujpari A.I.R. 1967 S.C. 272 (both of these are on the right of partition in S.3(2) of the Act; Sham Lal v Amar Nath A.I.R. 1970 S.C. 1643.

23. Kotturuswami v Veeravva A.I.R. 1959 S.C. 577; Munnalal v Rajkumar A.I.R. 1962 S.C. 1493; Eramma v Veerupana A.I.R. 1966 S.C. 1879; Sukh Ram v Gauri Shankar A.I.R. 1968 S.C. 365; Rani Bai v Yadunandan A.I.R. 1969 S.C. 1118; Punithavalli Ammal v Ramalingam A.I.R. 1970 S.C. 1730; Din Dayal v Rajaram A.I.R. 1970 S.C. 1019; Badri Pershad v Kanso Devi A.I.R. 1970 S.C. 1963; Karni v Amru A.I.R. 1971 S.C. 745.

24. Nagendra Prashad v Kempanam Jamma A.I.R. 1968 S.C. 209 (on the Mysore Act 10 of 1933); Giani Ram v Ramji Lal A.I.R. 1969 S.C. 1144 (on S.4 of the H.S.A.); Gopal Rao v Satharamma A.I.R. 1965 S.C. 1970 (on the right of a concubine to claim maintenance under S.23(2) of H.A.M.A.); Kulbhushan v Raj Kumari A.I.R. 1971 S.C. 234 (on S.23(2) of H.A.M.A.).

25. Karpagathachi v Nagarthinathachi A.I.R. 1965 S.C. 1752.

26. C.I.T. v G.S.Mills A.I.R. 1966 S.C. 24.

27. We have not included in this list the decisions which we are going to discuss below.

28. See f.n. 14 (supra).

29. See f.n. 15 (supra).

30. A.I.R. 1954 S.C. 601.

in Fateh Bibi v Charan Das[31] where the Supreme Court approved of the Act applying to the estates of males who had died before the Act but whose widows died after the Act, thereby giving the Act retrospective effect; the decision in Nagendra Prashad v Kempanam[32] where Bhargava J. (for Bachawat J., Shelat J. Dissenting) granted the step grandmother of a S.S.C. a share in the J.F.P.; and the decision in Gopal Rao v Satharamma[33] where the Court gave a concubine the right of maintenance under Section 23 (2) of H.A.M.A. At the same time the Court has been careful not to give the widow powers under the H.W.R.P.A., which would undermine the interests of the coparceners and reversioners.[34] An exception to this is Sukh Ram v Gauri Shankar[35] when Shah J. held that a widow who held an interest in J.F.P. was not bound by the same restrictions qua alienation as other coparceners.

But though the Court has been quick to recognise the property rights of women, the Court has not totally reconciled itself to recognising that women should be trusted in positions of responsibility. Thus in C.I.T. v G. S. Mills[36] the Court made an obiter dictum that a woman cannot be the Karta of a joint family. This decision seems strange if we remember that women in India occupy extremely high positions

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31. A.I.R. 1970 S.C. 789. For the other decisions on the Act see supra f.n. 21.

32. A.I.R. 1968 S.C. 209. Shelat J.'s judgement shows that the matter was not free from doubt.

33. A.I.R. 1965 S.C. 1970.

34. See particularly the decisions cited supra f.n.19 laying down that surrender must be complete not partial and the decisions cited supra f.n. 22 on the widow's right to partition under the H.W.R.P.A.

35. A.I.R. 1968 S.C. 365 at pr.5 p.366.

36. A.I.R. 1966 S.C. 24. Subba Rao J. reading the judgement of the Court for Shah and Sikri JJ.

of responsibility including the post of the Prime Minister.[37] The Court has once again applied an all too logical Hindu law position and relied in the main on the arguments of the judges of the Madras High Court (the judgement writer K. Subba Rao having come from the neighbouring state of Andhra Pradesh)[38] and distinguished very casually the contrary view from the Nagpur and Calcutta High Courts.[39] The Court's position (borrowed from the Madras High Court) was F In order to be a karta one must be a coparcener; since the widow is not a coparcener she cannot be the Karta. Once again the Court has taken a strictly logical position without going into either the theoretical presuppositions of their decision or the practical consequences which it gives rise to. Professor Derrett commenting on the decision has

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37. This was also true at the time the decision was made. For a recent brief survey about the role of women in modern industrial India see the article "A woman's place is no longer in the home" in India Weekly, (Vol. VIII No.19) May 11,1972 p.8. The article briefly reviews the development of women's emancipation from the nineteenth century to the present day.

38. See the Madras decision: Radha Ammal v I.T.Commr. A.I.R. 1950 Mad. 538 at 539, 540; see also the Orissa decision in Maguni Padhano v Lokananidhi A.I.R. 1956 Orissa 1. The Supreme Court refers to both these in A.I.R. 1966 S.C. 24 at pr.10 p.28 relying heavily on the judgements of Viswanatha Sastri and Satyanarayana Rao J. in the former case.

39. The Nagpur cases: C.I.T. v Laxmi Narayan A.I.R. 1949 Nag. 128 and Pandurang Vithoba v Pandurang Ramchandra A.I.R. 1947 Nag. 128 are mentioned by the Court at A.I.R. 1966 S.C. 24 at pr.10 p.28 but no comment is made on them. The Court does however try to distinguish the Calcutta decisions (Sushilla Devi v C.I.T. A.I.R. 1959 Cal. 697; Smt. Champa Kumari v Add. Member, Board of Rev. (1961) 46 I.T.R. 81 (Cal) on the grounds that they merely held that the widow could be karta only for revenue purposes. Surely if the widow can represent the sons for revenue purposes she can also continue a partnership contract (as was the problem before the Supreme Court) between two joint families. For a useful critical account of the Madras and Nagpur decisions see R. Banatwala: Whether a female member of a joint Hindu family can become Karta or manager of the family A.I.R. 1951 Jnl. 66.

shown that the circumstance of an absent husband was familiar to dharmasastra writers, who agreed that in the absence of the senior members of the family liabilities incurred by the widow had to be honoured by her husband.[40] An approach considering the mother as guardian has been fully considered in a recent Madras case.[41] Again the decision creates the absurd practical result that junior members of a family are inadequately represented when they could easily be represented by their mother. Indeed in the case before the Supreme Court the Court suggested that the partnership become valid only when the son of the deceased Karta came of age and that his mother could not represent his interest as Karta in the intervening years.[42] Once again in an important branch of Hindu law the Court relying on strict logic and the jurisprudence of the High Courts appears to have lost sight of the practical situation that the rules of Hindu law were to cater to.

Bearing in mind some of these facts about the Supreme Court's views on women's rights we will concentrate on two problems before the Court :

(a) The rights of the daughter and the gift making power of the father

(b) The interpretation of Section 14 of the H.S.A.

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40. Derrett: May a Hindu woman be the manager of a joint family ? (1966) 68 Bom.L.R.Jnl. 1 at 3-9 where all the texts are set out. In addition see the comments at C.M.H.L. (1970) 117-121. More texts are cited at 118 f.n.6.

41. See Ramanujan J.'s carefully thought out judgement in Venkata Krishna Reddy v Amarababa (1971) 2 M.L.J. 466.

42. A.I.R. 1966 S.C. 24 at pr.10 p.28.

iii. The rights of the daughter and the gift making power of the father.

Guramma v Mallappa[43] is an admirable piece of judicial legislation[44] in which Subba Rao J. (reading the judgement for Dayal and Mudholkar JJ.) relied on certain obsolete texts guaranteeing the daughter a limited share in J.F.P. and extended the Karta's power to make gifts of immoveable property to the daughter. This decision gives the appearance of legalising large "dowries" which have been officially abolished by statute.[45] But such a simple explanation would ignore both the śāstric knowledge on the subject as well as the fact that the problem of a single daughter, whether married, separated, or divorced, is as much a problem in India as it is elsewhere.[46]

The basis of the decision is the ancient texts which guarantee to the sister a fourth share in the event of a partition between the brothers. His lordship, referring to the text of Manu (IX.118) observed :

> "These and similar other texts indicate that the Hindu law texts not only sanction the giving of property to daughters at

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43. A.I.R. 1964 S.C. 510.

44. Derrett: C.M.H.L. (1970) 92 (see generally the whole discussion on the case at pp.90-93. For other comments on the case see Derrett: Teaching Hindu law in this decade (1965) 5 Jai.L.Jnl. 18; Ibid: Guramma v Mallappa: A recent reinterpretation of the Mitākṣharā by the Supreme Court (1964) 66 Bom.L.R.Jnl. 129. Prof. Derrett's view that the judgement is to be welcomed even though it did not accord with the spirit of the Mitākṣharā law was commented on by S.R.Baj: Gift of ancestral immoveable property to daughters (1965) 5 Jai.L.Jnl. 143 where it was suggested that the decision accords with the traditional law. But see the reply by Derrett: Gifts of affection: The Supreme Court revises the Mitākṣharā law A.I.R. 1965 Jnl. 34.

45. See the Dowry Prohibition Act 1961 and the comments of Derrett: I.M.H.L. (1963) 144-5.

46. See for example the recent report: The Single Woman keeping a job and caring for the old (National Council for the Single Woman and her Dependants, London, 1971). See the report and comments in The Times June 26,1971. The report in brief urges the State to perform the functions which in our context are performed by the joint family.

> the time of partition or at the time of marriage, as the case may be, but also condemn the derelection of the said duty in unequivocal terms. It is true that these Hindu law texts have now become obsolete. The daughter has lost her right to share in the family property. But ... the right has been crystallised into a moral obligation on the part of the father to provide for the daughter either by way of marriage provision or subsequently." 47

The texts on the rights of the daughter are quite clear[48] and they were relied on and applied by Sir B. PL Bose in Mt. Lochan v Dabai (1909),[49] which for all intents and purposes is still a valid authority in Nagpur, having been approved in an obiter dictum in two recent cases,[50] But in the early nineteenth century it was pointed out that the sister could not herself demand a partition and that therefore what she posssessed was a claim and not a right.[51] It was therefore argued that

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47. A.I.R. 1964 S.C. 510 at pr116 p.518 col.1.

48. See Manu: IX.118; Vishnu: XVIII.34-5; Narada XIII.2.13; Yājñavalkya: II.124; Brihaspati: XXV.64; Mitākshara I.vii.10-11; Jaganatha: I C.D. 185. Some of these are cited by the Supreme Court at A.I.R. 1964 S.C. 510 at pr.16 p.517. See also V.N.Kapoor: Rights of an unmarried daughter in father's property under the Hindu law A.I.R. 1966 Jnl. 63 (but Mr. Kapoor, though writing after the Supreme Court judgement does not mention either the judgement or the case law it is based on.). H.S.Gaur: Hindu Code (1938 4d) 608-11; J.Jolly: History of the Hindu law of partition, inheritance and adoption (T.L.L. 1883) 103-4. Kane: III H.D. 619-20.

49. (1909) 5 Nag. L.R. 161 at 170-1. The fact that H.S.Gaur argued the case might explain why he relies on it in his book (supra f.n.48) while the decision "is ignored by Kane, Mayne, Mulla, Trevelyan, Gupta and Raghavachariar !" (per Derrett (1970) 91 f.n.7.).

50. Shamrao v Nagpur (1948) Nag. 678 at 686 (per Bose J.); Bhagwantrao v Punjaram (1938) Nag. 255 at 263-4 (per Stone C.J. and Bose J.) Note that the decision is on illegimate sons and the argument of daughters is being relied upon by analogy in both these cases.

51. See Strange: I Hindu law 109; Macnaghten: Principles of Hindu Law 50-51. Note the slightly different point of view expressed in the case from the Zilla of Chingleput (1804) reported at Strange: II Hindu law 299-301 (note the opinion of the pundit - T.Kistnamacharee - at p.299 and the opinion of Ellis (p.300)aand of Sutherland at 310); see also the case of Kylapa Counden v Nallaya Counden (1808) reported Strange: II Hindu law 360 and the opinion of Colebroke and Ellis at 361. In this case an actual division giving the daughter a share was suggested by the pundit. F.W.Macnaghten: Considerations on Hindu law as it is current in Bengal (1824) 98-105 suggesting that the rule had become obsolete. After this the question tended to be academic: See K.K.Bhattacharya: The law relating to the Hindu joint family (1885) 64-66; 143-8; S.G.Grady: Manual of Hindu law (1871 London) 197, 205; Gooroodass Banerjee: The Hindu law of marriage and stridhana (1878) 222 where only the texts are mentioned. Kane: III H.D. 619-20 assumes that the rule had become obsolete.

her right was really given in lieu of marriage expenses, as was accepted by Mitter J. (for Maclean J. and himself) in Damoodur v Senabutty (1882).[52] This view was reinforced by several decisions in the Madras High Court, and relied upon by the Supreme Court[53], which recognise the father's right to give a present of immoveable property to the daughter at the time of her marriage. These decisions, (which must be read in the context of the Madras custom "bhūdānam") which enjoins that the father give land to the son-in-law,[54] were dissented from by the Bombay High Court in Jinnappa v Chimmava.[55] It should also be noted that the Privy Council delivered two decisions which accepted the father's right to make gifts to his daughter and

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52. (1882) 8 Cal. 537 at 541.

53. See Ramasami Ayyar v Vengidisani Ayyar (1898) 22 Mad.113 at 115 (relied upon by the Supreme Court in A.I.R. 1964 S.C. 510 at pr.16 p.518 col.20; Kudutamma v Narasimhancharyalu (1907) 17 M.L.J. 528; Sundarammaya v Seethamma (1911) 21 M.L.J. 695 (relied upon by the Supreme Court at pr.16 p.518 col.2); Vettor Ammal v Pooch Ammal (1912) 22 M.L.J. 321; Sithalahalakshmamma v Kottayya A.I.R. 1936 Mad. 825 (relied upon by the Supreme Court at pr.16 p.519 col.1). The Supreme Court also rely on two other cases (at pr.16 p.519) viz. Churaman Sahu v Gopi Sahu (1909) 37 Cal. 1; Annamalai v Sundarathammal A.I.R. 1953 Mad.404 at 406. Note that Subba Rao J. does not cite some of the more recent judgements which take a slighly limited view of the problem: Sivagnama Thevar v Udayar Thevar A.I.R. 1961 Mad. 356 (gift to wife); Palwana Nadar v Annamalai A.I.R. 1957 Mad. 330 which did not agree with judgement in Annamalai v Sundarathammal A.I.R. 1953 Mad 404 (relied upon by Subba Rao J.); Karuppa Goundan v Paliannamal A.I.R. 1963 Mad. 245; Hari Shankar v Ram Sarup A.I.R. 1938 Lah. 113; Dhondiram v Bhagubjai A.I.R. 1956 Hyd. 118; Tara v Raghunath A.I.R. 1963 Orissa 50 (but here the gift was held valid even though not connected with the marriage.).

54. Srinivasa v Parvathiammal (1969) 2 M.L.J. 597. I am indebted to Prof. Derrett for this point and this reference. It is also cited in C.M.H.L. (1970) 91.

55. A.I.R. 1935 Bom. 324; See also the earlier case of Haridas v Devkuvarbai A.I.R. 1926 Bom. 408 where Macleod J. suggests (at p.409 col.1) that such a gift can be made. But note the fact (at 409-10) that the son did not complain for two years after the father's death; Vyascharya v Venkubai (1912) 37 Bom. 251 (F.B.). Here the natural father of an adoptee consented to the alienation by the widow. But the point was decided on the basis of the question whether such consent can be given.

in one of the decisions even suggested that a give of immoveable property could be made.[56]

But let us go back to Guramma's case. Unlike the earlier Supreme Court case, Kamala Devi v Bachulal Gupta,[57] where the gift was definitely connected with the daughter's marriage, in Guramma's case the gift had been made to a widowed daughter. Thus the former can be justified as an alienation for religious purposes (the marriage of a daughter being a religious purpose) but the latter is difficult to justify in the face of the clear text of the Mitākharā (I.i.25) which expressly prohibits the gift of immoveable property as a token of affection. The reason for the rule is easy to understand if we remember that even now a large part of the family wealth of the great mass of Hindu joint families is concentrated on the land and it is imprudent to allow the Karta to have the power to dispose of the property as a gift of affection. Indeed this can be seen in Subba Rao J.'s difficulty in dealing with the restrictions in the Mitākharā. Subba Rao J. tries to suggest that the power of granting gifts to the daughter must be independently construed and says :

> "At the outset it would be convenient to clear the ground. Verses 27.28 and 29 in Ch.I Mitākharā describe the limitations placed on a father in making gifts of (the) ancestral estate.

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56. The leading judgement is Bachoo v Mankorebai (1907) 31 Bom.373 at 379 (relied upon by Subba Rao J. at p.518-9). Note no question of alienating immoveable property arose in this case, even though S.R.Baj (supra f.n.44) 144 assumes it did; Ramalinga v Annavi A.I.R. 1922 P.C. 201 at 209 where Ammeer Ali J. refers to a judgement of the Board where such a gift was allowed. But that judgement was not traceable and is not mentioned in the judgement. In this case the father assigned to his daughters some money and a usufructary mortgage. This case is also relied upon by Subba Roa J. who quotes the passage mentioning the "earlier judgement of the Board" at pr.16 p.519 col.1.

57. A.I.R. 1957 S.C. 434 but note that at 443 S.K.Das J. (reading the judgement of the Court) leaves open the question whether gifts can be given after marriage.

> They do not expressly deal with the right of a father to make provision for his daughter by giving her some family property at the time of her marriage or subsequently. The right is defined separately by Hindu law texts and evolved by (a) long catena of decisions based on the said texts." 58

Thus as one foreign observer has shown one important aspect of the case was not even considered by the Court.[59] But there are some reservations on the power to make such gifts in the judgement itself, and it is clearly stated that

> "(t)he father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family." 60

Happily, more recently the Court has made it clear that this power of the father's extends only to making gifts to his daughter and cannot be extended to making gifts to his wife.[61]

Thus we see that although the Court had neglected to consider one very important aspect of the problem, the decision in Guramma's case is a creative judgement. It considers the problems of the daughter and the śāstric position and uses the techniques of Anglo-Hindu law to solve the problem. To insist on the right of a share at partition would now be inconceivable. Indeed to the extent to which it was possible this has already been done to some extent by Section 6 of the H.S.A. The only way to make that right real and capable of being exercised in the father's lifetime and independently of the daughter's

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58. A.I.R. 1964 S.C. 510 at pr.16 p.517.

59. Derrett: see references cited supra f.n. 44.

60. A.I.R. 1964 S.C. 510 at pr.18 p.519. This is the summary paragraph where the "legal position" is summarised.

61. A Perumalakkal v Kumaresen A.I.R. 1967 S.C. 569 (per Wanchoo J. reading the judgement of the Court.

marriage was to introduce it not as a right in the daughter's hands (which even the śāstric texts did not intend it to be) but as a power in the hands of the father. The judgement is a rare example of a creative interpretation of the śāstric texts in a modern context.

iv. The interpretation of Section 14 of the H.S.A.

The Supreme Court has decided nine cases on this section.[62] Before we examine them it would be convenient to reproduce the terms of the Section itself :

> Section 14 (1) "Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."
>
> Explanation : "In this subsection 'property' includes both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion or by purchase or prescription, or in any other manner whatsoever, also any such property held by her as stridhana immediately before the commencement of this Act."
>
> (2) "Nothing contained in subsection (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order prescribe a restricted estate in such property."

A great deal of controversy has arisen about the interpretation of this section.[63] In the main it has centred upon the interpretation

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62. See supra f.n. 23.

63. For an up to date review of the problem see Derrett: C.M.H.L. (1970) Chapter7; See further Derrett: Some problems arising under the Hindu Succession Act (1959) Bom.L.R.Jnl.33; Ibid: Recent decisions and some queries in Hindu law (1957) 59 Bom.L.R. Jnl. 178 at 187-8; S.R.Gohkale: A note on Munnalal versus Rajkumar (A.I.R. 1962 Supreme Court 1493) and Sec. 14 of the Hindu Succession Act 1956 A.I.R. 1962 Jnl. 85; Derrett: Section 14(2) of the Hindu Succession Act: A disturbing decision from Andhra Pradesh (1969) 71 Bom.L.R. Jnl. 62; Ibid: A note on Kunji Thomman v Meenakshi A.I.R. 1970 Ker.284 (1971) K.L.I. Jnl. 25-6; Ibid: Section 14 of the Hindu Succession Act 1956 and a recent Supreme Court decision (1971) 73 Bom.L.R.Jnl.50; M.S.Vaidya: Section 22 of the Hindu Succession Act: A plea for its amendment (1971) 73 Bom.L.R. Jnl. 42(not directly in point); Derrett: A Hindu law miscellany (1971) I used a photocopy of the draft, kindly given to me by the author. A.V.Krishna Murti: Effect of mode of acquisition of the property possessed by a family Hindu on Section 14(1) (1971) And.W.R.Jnl. 13-16.

of "possessed" in Section 14(1), and on the inter-relation between Section 14(1) and (2). The latter section was inserted to ensure that a woman is not in a better position than men and states quite clearly that it is still possible to make a limited grant in favour of women. But a conflict can easily arise where the woman claims that she has a right to the property and is therefore "possessed" of it and the grantor (or for that matter donor or testator) inserts a limitation which is narrower than the right she claims. The problem is: Does her right take precedence over the limitation ? Let us examine these problems in the light of the Supreme Court cases.

The Supreme Court first considered Section 14 in Kotturuswami v Veeravva[64] where the widow had used the well-tried tactics of adopting a son to defeat the claims of her reversioners.[65] Imam J. (a Muslim judge[66]) reading the judgement of the Court held that Section 14 had not abolished reversioners[67] but merely sought to

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64. A.I.R. 1959 S.C. 577.

65. Ibid at pr.2 p.578-9. Two attempts to adopt were made. The legality of the first adoption was questioned but this was abandoned because the adoptee died. Note the father died in 1920; the adoptions were made in 1939 and 1942 respectively.

66. One cannot make much of this point and indeed as M.H.Beg in a letter to the present writer (dated Jan.6,1972) suggested, this wrongly suggests that judicial decision is an overtly conscious affair. But such decisions are rare and must be highlighted. Other significant examples include Hidayatullah J.'s outstanding and painstaking judgement in Narayan v Gopal A.I.R. 1960 S.C. 100 (on the construction of the deeds of a religious endowment) and the same judge's judgement in Parbati Kuer v Sarangdhar (see supra Chapter V Section 3 ii) A.I.R. 1960 S.C. 403. All these belong to the same period, i.e. when there was no Hindu law expert in the Court. Before this the judgements were written by Mukerjea and T.L.V.Ayyar JJ. and after this by Ramaswami, Subba Rao and Hegde JJ.

67. A.I.R. 1959 S.C. 577 at pr.10 p.581. The Court approved of Lukai v Niranjan A.I.R. 1958 Pat.160; Harak Singh v Kailash Singh A.I.R. 1959 Pat. 581 and disapproved of the earlier Patna decisions (Rama v Ragunath A.I.R. 1957 Pat. 480; Janki v Chhathu Prashad A.I.R. 1957 Pat.674) which had taken the contrary view. Note that Imam J. was himself from the Patna High Court.

increase the rights of women.[68] His lordship did not go as far as the Andhra High Court by suggesting that a widow-trespasser was also in "possession" of her estate under Section 14(1),[69] but decided that the word must be interpreted as widely as possible[70] and held that the widow was still in possession of the estate - the possession of the adopted son being purely permissive.[71]

This case has been generally followed.[72] In two important cases, Eramma v Veerupana[73] and Din Dayal v Rajaram,[74] the Court however made it clear that Section 14(1) did not apply in the case of a trespasser, even though in neither of the cases did the Supreme Court go into the question of constructive possession, which was so important a part of Kotturuswami's case where the Court held that the widow was in "possession" of an estate actually in the hands of her adopted son with her permission. Nor did the Court explore the various

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68. Ibid at pr.10 - 11 pp.581-2.

69. Ibid at pr.11 p.581 col.2. See the wider suggestion in the judgement of Satyanarayana Raju J. in Venkayamma v Veerayya A.I.R. 1957 A.P. 280. A position subsequently resiled from.

70. Ibid at pr.11 p.581-2.

71. Ibid at pr.11 p.582 col.1. It appears that though not directly in point the rights of the adoptee have been completely ignored. Contrast the case of Sawan Ram v Kalawanti A.I.R. 1967 S.C. 1761 where had the widows not died the Court would have followed the line taken by the Courts below that the adopted son's rights precluded the reversioners from making a challenge.

72. Apart from the High Court cases see Munnalal v Rajkumar A.I.R. 1962 S.C. 1493 at pr.15 p.1499; Badri Pershad v Kanso Devi A.I.R. 1970 S.C. 1963 at pr.6 p.965 col.1.

73. A.I.R. 1966 S.C. 1879.

74. A.I.R. 1970 S.C. 1019.

facts fully[75] But we can see that the Court has taken a very sensible view of the subsection and, unlike the Patna and Andhra Pradesh High Courts, has safeguarded the rights of reversioners and at the same time given full effect to the claims of the women in the cases before them.

Equally important, and perhaps more influential, is the judgement in Munnalal v Rajkumar[76] where Shah J. (for S. K. Das and Hidayatullah J.) reading the judgement held that a female who died after a preliminary decree for partition had been passed granting her a fourth share (her husband's share which passed on to her under Section 3(2) of the H.W.R.P.A.) was "possessed" of that share within the meaning of Section 14(1) of the H.S.A. This judgement has been criticised partly on the ground of the rule of statutory construction that a statute must not be construed as having taken away already existing rights but largely on the ground that the words "and not as limited" owner at the end of Section 14 (1) imply that the rights intended to be made absolute were limited rights and not a share at partition.[77] But let us get back to the arguments of the Mitākshara

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75. In the former case two widows of the father of the S.S.C. kept the S.S.C.'s estate using two adoptions found to be invalid. The Court did not consider either the right of maintenance of the two co-widows or discuss the very important question whether the co-widows could themselves succeed to the S.S.C. by virtue of the H.W.R.P.A. (if it applied - the father died in 1936-7). On this latter question see Derrett: The Hindu Women's right to Property Act 1937: A sting in the tail (1965) 67 Bom.L.R. Jnl. 35; Ibid: The Hindu Women's Right to Property Act 1937: A change of direction in Madras and an apology (1965) I M.L.J. Jnl.13. In the latter case the estate passed from the widow to the daughter, whose rights are not considered.

76. A.I.R. 1962 S.C. 1493 at pr.16 p.1499.

77. S.R.Gokhale: (supra f.n.63) A.I.R. 1962 Jnl. 85 at pr.8 p.86 where he takes up the argument about the rule of construction and makes a strange analogy with Article 31 of the Constitution hinting that compensation must be paid where rights are taken away in this way ! ; at pr.10 p.87 where he suggests that the Court ignore the last phrase in S.14(1). His article was praised by Derrett: C.M.H.L. (1970) 217 f.n.9.

which, though not accepted by the Privy Council,[78] clearly postulate that the share on partition was clearly intended to be part of a woman's stridhana.[79] What the Court appeafs to have done is to instinctively follow the Mitākharā view. It certainly eats into J.F.P. but a situation wherein a widow who got a share at an actual partition at Hindu law is able to claim under Section 14 (1) whereas a widow who was merely awarded a share at a preliminary decree is not, would clearly be anomalous. Far more important is the decision in Sukh Ram v Gauri Shankar[80] where the widow had not asked for a partition, but had (after the passing of the H.S.A.) alienated her share to a stranger. Shah J. (for Sikri and Shelat JJ.) held that she could alienate the property irrespective of the limitations which the Mitākharā placed on the other coparceners, whereby they could not effect such an alienation without each other's consent. His lordship was prepared to dismiss the circumstance that this in fact gave her wider powers than the other male coparceners and argued that since the interest given by the H.W.R.P.A. was property, it followed that under Section 14

> "she became full owner of th(e) property (;) she acquired a right unlimited in point of user and duration and uninhibited in point of disposition." 81

Apart from using these Blackstonian terms to describe the rights of the owner,[82] the Court justified its decision on the grounds that the

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78. See supra f.n. 8 and 9 and the texts corresponding to them.

79. Mayne (11d) 728 (referring to Dr. Jolly) rightly points out that Vijñāneśvara made a share at partition part of a woman's stridhana, but it was nowhere suggested that it would be at her absolute disposal.

80. A.I.R. 1968 S.C. 365.

81. Ibid at pr.4 p.366.

82. For a description of Blackstone's views on property as contrasted with the Indian approach to the subject see supra Chapter III Section 2.

restrictions were unimportant because in schools other than the Benares school (to which this case belonged) this limitation had been dispensed with. This is taking the principles too far and must be reconsidered and all the more so because the Court went out of its way to say :

> "We are unable to agree ... that restrictions on the right of the male members of the Hindu joint family form the bed-rock on which the law relating to joint family property is founded." 83

As we have already shown, the rights of a coparcener to alienate his share is in spirit opposed to the joint family principle and really a concession to convenience.[84]

But the most controversial area has been on the inter-relation between Section 14 (1) and (2). In Badri Pershad v Kanso Devi[85] the Court observed :

> "Subsection (2) of Section 14 is more in the nature of a proviso or an exception to subsection (1). It can come into operation only if acquisition is made in any of the methods indicated therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property."

The question that gave rise to a great deal of controversy was whether a right to maintenance was property "possessed" within the meaning of the subsection so as to create a pre-existing right in the widow and preclude the operation of Section 14 (2). Before we proceed any further we should take not of a few matters. Firstly, we must get rid of the notion popularised by Gopisetti v Subbarayudu[86] that a right to maintenance is not a right to property because this clearly

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83. A.I.R. 1968 S.C. 365 at pr.5 p.366.

84. See supra Chapter V Section 1. This has also been hinted at in Chapter VI Section 1 (iii)(a). See Derrett: R.L.S.I. Ch.12, esp.p.427.

85. A.I.R. 1970 S.C. 1963 pr.7 p.1966.

86. (1968) 2 And.W.R. 455. See the comments of Derrett: (1969) 71 Bom. L.R. Jnl. 62 at 67.

ignores the fact that in India, ownership rights often merely consist of "claims".[87] Secondly, we should remember that well before the passing of the H.S.A., the Supreme Court[88] had made clear that there was no reason for supposing that a grant to a widow whether of maintenance or otherwise, was limited. Thirdly, we should remember that Section 22 of H.A.M.A. clearly lays down that the heirs of a deceased person are bound to maintain dependants of the deceased person.[89] Lastly, one must not overlook the fact that a majority of the High Courts in India held that the right to maintenance was not a pre-existing right within the meaning of Section 14 (1).[90] But in Rani Bai v Yadunandan[91] Grover J. (for Shah and Ramaswami JJ.) held that a widow of a predeceased son who had a right to be maintained out of the estate of the S.S.C. (the father) could keep the property she possessed in liew of maintenance with respect to any claims made by the S.S.C.'s donee, even though her claim was not specifically a charge on the estate. The Court observed in passing :

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87. See the decisions cited f.n.15 supra. This point is also made by Derrett: C.M.H.L. (1970) 202.

88. See supra f.n.15.

89. S.22(2) and (4). For a general comment on the operation of this subsection see M.S.Vaidya (supra f.n.63) (1971) 73 Bom.L.R. Jnl. 41.

90. The following judgements hold that maintenance grants fall within the reach of Section 14(1): Sumeshwar v Swami Nath A.I.R. 1970 Pat.348; Bindbashni Singh v Sheorati Kuer A.I.R. 1971 Pat. 104; for examples of the opposite view see Gopisetti v Subbarayudu (supra f.n.86); Santhanam v Subramania (1967) 1 Mad.68; P.Pattabhiraman v Parijatham A.I.R. 1970 Mad. 257; Narayan v Tara A.I.R. 1970 Orissa 131; Likhmi Chand v Sukhdevi A.I.R. 1970 Raj. 285; Basdeo v Dir.Consolidation (1969) All.L.R. 1027. See also K.Thomman v Meenakshi A.I.R. 1970 Ker. 284 where M.Nair and Krishnamoorthy Iyer JJ. held (at pr.17) that the daughter-in-law had a right of maintenance in her father-in-law's estate but that the grant to her under a family arrangement fell within S.14(2) (see also the comments of Derrett (1971) K.L.T. Jnl. 25.).

91. A.I.R. 1969 S.C. 1118 at pr.4 p.1120-1.

> "It is clear from provisions of the Explanation appearing in Section 14 of the Hindu Succession Act that a situation was contemplated where a female Hindu could be in possession of joint family properties in lieu of maintenance." 92

Now let us turn to the Supreme Court decision in Badri Pershad v Kanso Devi.[93] Grover J. relying on an earlier judgement of the Court held that a widow who had acquired her husband's coparcenery rights under the H.W.R.P.A. and was given a definite share as a result of arbitration, was "possessed" of that share within the meaning of Section 14 (1), even though the award clearly stated that she had "a woman's limited estate".[94] The Court accepted that

> "sub-section (2) made it clear that the object of Section 14 was only to remove the disability on women imposed by law and not to interfere with contracts, grants or decrees etc. by virtue of which a woman's right was restricted." 95

But Grover J. also made it clear that

> "(t)he word 'acquired' in sub-section (1) should be given the widest interpretation. This would be so because of the language of the explanation which makes sub-section (1) applicable to acquisition of property by inheritance or devise or at partition or in lieu of maintenance or arrears of maintenance or by gift or by a female's skill or exertion or by purchase or prescription or in any manner whatsoever." 96

In spite of these clear dicta, in Karni v Amru[97] Hegde J. (for Shah J. - who had participated in both Rani Bai's case as well as Badri Pershad's case - and Grover J. - who wrote the judgement in the latter case),

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92. Ibid at pr.4 p.1121 col.1.

93. A.I.R. 1970 S.C. 1963.

94. Ibid at pr.6 p.1965-6 where the Court relies on Kotturuswami v Verravva A.I.R. 1959 S.C. 577; Munnalal v Rajkumar A.I.R. 1962 S.C. 1493; pr.7 p.1966 where the Court relied on Sukh Ram v Gauri Shankar A.I.R. 1968 S.C. 365.

95. Ibid at pr.7 p.1966, referring to Rangaswami Naicker v Chinnamal A.I.R. 1964 Mad. 387.

96. Ibid at pr.6 p.1966.

97. A.I.R. 1971 S.C. 745.

held :

> "The life estate given to her under the will cannot become an absolute estate under the provisions of the Hindu Succession Act. Therefore the appellant cannot claim any title to the suit properties on the basis of the will executed ... in her favour." 98

His lordship, in his extremely short judgement (barely two columns long) did not even examine whether she had a subsisting or antecedent right to maintenance and we are left to suppose (as Professor Derrett does[99]) that if the judgement is right (and we must assume it is) it was one of those one-in-a-thousand cases (e.g. where the woman is criminally responsible for the death of the owner of the estate from which maintenance is claimed) where the widow could not claim maintenance or had, e.g., sufficient means of her own and her claim could be ignored.

Once again the Court has not decided an important point on which there is such a lot of controversy, and on which uniform rule of the Supreme Court was definitely called for.

To sum up : we will see therefore that on the whole the Supreme Court has taken a fairly liberal view of women's rights taking care (except in Sukh Ram's case) however not to encroach upon joint family interest. But the decisions usually follow the lead taken by the High Courts and the conservatism of the Court is brought out into the open in their decision that women are not allowed to be Kartas of a joint family. But it is ironical that the author of that ruling (Subba Rao J.) should also have written the judgement in Guramma v Mallappa, where the Court carelessly overlooked the very important point about the father's power to gift immoveable property, but was at

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98. Ibid at pr.2 p.746.

99. Derrett: A Hindu law Miscellany (1971 - draft copy) p.4.

the time able to blend delicately śāstric learning with the prevalent Indian situation which clearly demands that the daughter be afforded protection. The Court did not reverse established case law and accord the daughter the ancient rights accorded to her, but gave Hindu fathers the power to give her those rights and left it to Hindu society to take advantage of, or to ignore, these new powers.

We cannot attribute any doctrinaire attitude to the Court(s interpretation of Section 14 of the H.S.A., even though one can say that apart from the new trend started in Karni v Amru (assuming that the decision is wrongly decided and the widow did have a right to maintenance) that the Court has leaned in favour of women's rights. But once again we are confronted with a pattern of inconsequentiality. This is a serious flaw in the judgements if we remember that by virtue of the status accorded to Supreme Court decisions under 141 of the Constitution the Supreme Court occupies an important position in making the law in the country uniform and is not merely a third Court of appeal.

4. Conclusion.

We can see at the very outset that in dealing with problems of Hindu law the Supreme Court has very rarely considered concepts, ideas and institutions on the basis of the traditional texts, which though technically obsolete still represent in theory and practice the basis of the living law of the Hindus. Instead the Court has tried to refine (or avoid, or simply follow) the categories created by the Privy Council. This becomes very clear when we consider the Court's attitude to the P.O. There is no hint that the Court considered that institution for the kind of financial arrangement it really was. Nor can this be implied from its judgements. The ultimate result may well be practical and neat, but it ignores the rights of the son and can hardly be considered an attempt to up-date the old law. In Faqir Chand's case the Court claims to have applied Occam's razor and done away with procedural cobwebs. This is an improvement in itself. But we must not forget that the basic jurisprudence in this area came from the High Courts even though they differed on the details of applicability.

This approach can also be sensed in the area of adoption where even in cases to which H.A.M.A. does not apply the Court has not consistently tried to protect the rights of the adoptee, which has created a great deal of confusion in the area of applying "relation back" to the legal situation of the S.S.C. or where the doctrine can only apply at the expense of divesting a statutory heir. We can see that the High Courts have been able to ignore the clear dicta of the Supreme Court because of the inconsistency. The Court seems to have forgotten that one of its tasks is to make the law all over India uniform. But yet when considering the H.A.M.A., they seem to have invented a concept of "complete incorporation" without working out the details and even vaguely endorsing the suggestion that the apparently

clear terms of Section 12 (c) were intended to take somehow a limited effect. Its attitude to "adoption" as well as "the rule against divesting" have been largely theoretical. No-one will deny that the son should be adopted into the family as fully as possible and that this adoption should not create havoc by divesting titles. But what are required are clear details on how these two rules are to be adjusted. The inconsistent (even though technically reconcilable) attitudes that have emerged may well have been the product of a fragmented Bench structure, but if the judges of the Supreme Court cannot be expected to present a clear policy, it is infinitely more difficult for the unnumerable judges of the various High Courts to evolve one.

The Supreme Court evidently overlooked this while considering the problems of maintenance grants under Section 14 of the H.S.A., once again clearly ignoring that there was a controversy raging in the High Courts which could constitutionally only be resolved by the Supreme Court.

An excellent but perhaps more creditable example of this is Vaidialingam J.'s judgement in J. Vithal Rao Gajre v Pathankhan[1] where the Court ignored totally the fact that there was a controversy raging on the subject[2] and held that an alienation by a de facto guardian was valid. The result is justified on the ground that since the father had been away for twenty years and had taken no interest in his child, the mother could be treated as the natural guardian.[3] This is certainly judicial creativity in the face of a hard case. But it is also extremely piecemeal and suffers because the Court neglected to take a

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1. (1970) 2 S.C.J. 17.
2. Derrett: I.M.H.L. (1963) 84-8; Ibid: C.M.H.L. (1970) 185 ff.
3. (1971) 2 S.C.J. 17 at pr.5 p.19 col.1.

comprehensive view of the whole problem, ignoring Section 11 of the Hindu Minority and Guardianship Act 1956 which specifically forbids the de facto guardian to deal with a minor's property.

In actual fact we can see that the Supreme Court neither fulfils its constitutional function of creating uniformity, nor can it really be considered a Court of reform. If we look at its decisions on P.O., its decisions on adoption (excluding Srinivas v Narayan), its view that a woman cannot be a Karta of a joint family, and its creative but nevertheless traditional judgement in Guramma v Mallappa, we can see that even in areas where the Court has not derived its theoretical nourishment from the Privy Council or the High Courts, it has instinctively followed the traditional approach. But often the Court has not even sensed the spirit of these traditional notions and concentrated mechanically on interpreting the legal norms it has inherited from Anglo-Indian law. Too much attention has been paid to word play, too little to the fact that the problems before the Court are Indian problems and should be considered in the historical context in which they evolved.[4]

In none of these areas has the Court even for a moment applied its mind to substantial questions of psychological and social need. What is adoption for, and about ? How far can a power to incur private debts interfere with the father-son relationship for the future ? How far can the statutory interference (in 1956) with the grant, by law or by deed or will, of land to a woman by virtue of her relationship and

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4. A similar complaint is made by G. Sitarama Sastry: Judicial process in India : A study of judicial interpretation in some aspects of Hindu law (1968) Lawyer 14; Note also the comments of Derrett: Legal education and the future of Hindu law in M.B.Mujumdar (Ed): Principal Pandit, Law and Legal Education (1972 Poona) 34 at 40-41 suggesting that the climate is changing.

status as a dependant, be spelt out without imperilling the expectation of women (still by far the weaker sex in India) from their "men-folk" ? On these great matters, far more important than technical or prodedural points, the Supreme Court has had nothing to say. Here at least the various Benches, whatever their constitution, have been uniform and consistent, in their silence ! If they have avoided copying out the Privy Council's, or any foreigner's, view on the subjects (as irrelevant), they have equally failed to find any inspiration in India. Was it because there was none, or because they were not looking ?

CHAPTER VII

A Miscellany of Supreme Court Cases

In this Chapter we shall consider certain branches of the law where the Supreme Court adopts both in theory and in practice a different approach from the one assumed in various other aspects of the same problem. We will also consider any distinct example of judicial intervention peculiar to the Court.

The best examples are to be found in the area of civil liberties like "Obscenity", "Contempt of Court", and "Official Secrecy" where the Court takes a conservative attitude without explaining why the law in India, which proceeds with the same theoretical bias, arrives at a different result, while paying lip service to cosmopolitan norms. This contrasts with their theoretical attitude that fundamental rights are sacrosanct and should be protected at all costs, even though we have already seen in Chapters III and IV that their actual performance in this area is hardly spectacular. This overt theoretical approach culminated in Golak Nath v Punjab,[1] which we shall also consider briefly.

Equally important is the Supreme Court's attitude while considering the right to religion, group rights and the problem of minority protection. Here we will concentrate on two particular issues (1) the problem of cow slaughter; (2) the concept of positive discrimination.

No account of the Supreme Court would be complete without considering, in passing, the Supreme Court's contribution to problems of industrial relations, into which sphere the Court has strayed.

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1. A.I:R. 1967 S.C. 1643. For other examples of this overt attitude see supra Chapter II Section 3. For extrajudicial statements see K.Subba Rao: Man and Society (1971) Chapter 1.

1. A Miscellany of Cases on Civil Liberties.

It seems strange that a Court which in Golak Nath v Punjab had refused to allow Parliament to amend the Part on fundamental rights because it was sacrosanct, should assume a restrictive attitude in other areas of civil liberties, while at the same time trying to justify their approach on cosmopolitan rather than Indian grounds. This is certainly true of their attitude to Obscenity and to Contempt of Court by scandalising the judges. But what is more remarkable is their extremely conservative attitude to the problem of Official Secrecy, especially if we remember that openness in the administration is almost as (if not more) important to a democracy than elections.[2] We will consider all these and Golak Nath's case.

i. The problem of obscenity before the Supreme Court.

The Supreme Court has considered the law of obscenity in two important decisions[3] and, like most Indian jurists,[4] has considered the problem more as a problem of criminal law rather than as an issue of civil liberties.

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2. We must not forget that because of the "whip" and the preponderance of Prime Ministerial power, Parliament is no longer really a body controlling the power structure but merely a way of getting information. It is for this reason that one of the most important considerations when considering the establishment of the Ombudsman was that its institution would take away from Parliament its most important function. See: White Paper (1965) Cmd. 2767 pr.4; The Times editorial Oct.18 1966 p.11; D.G. T.Williams: Comment on the Parliamentary Commissioners Act 1967: (1967) 30 Mod.L.R. 547.

3. Ranjit Udeshi v Maharashtra A.I.R. 1965 S.C. 881; Chandrakant v Maharashtra A.I.R. 1970 S.C. 1890. Note that both these cases are from Maharashtra where a large part of the Indian film industry is located.

4. See J.N.Mallick: The Law of Obscenity in India (1966 Calcutta); G.Ranga Rathnam: Obscene posters, literature and publicities (1965) I M.L.J. Jnl. 17; A.K.Sarkar: Literature and Obscenity (1965) 67 Bom.L.R. Jnl. 121; N.Rajeshwar: The law of obscenity in India (1969) 117. See how brief the discussion on this is in Seervai: (1967) 334. For a purely criminal law approach see H.S.Gour and Nelson cited f.n.5 infra. and compare with Smith and Hogan: Criminal law (1969) 487-500.

Before we consider the Supreme Court cases, it will be convenient to set out the terms of Section 292 of the Indian Penal Code :

"whoever :-

Sale of Obscene books etc. (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire distribution, public exhibition or circulation, makes produces or has in his possession any obscene book, pamphlet, paper drawing, painting representation or figure or any other object whatsoever, or

(b) imports, exports or conveys any object for any of the purposes aforesaid, or knowing or having reason to believe that the such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation or,

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid made produced, purchased, kept, imported, conveyed, publicly exhibited or in any manner put into circulation or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any obscene act can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section

shall be liable to be punished with imprisonment of either description for a term which may extend to three months or with fine or with both.

Exception: This section does not extend to any book or pamphlet, writing or drawing or painting kept or used bona fide for religious purposes or any representation, sculptured, engraved, painted or otherwise represented on or in any temple or on any car used for the conveyance of idols, or kept or used for any religious purpose."

The Courts have been severe in interpreting these provisions.[5] They have generally taken into account the effect that the book would have on children,[6] ruled that a book may be obscene only if one passage

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5. See H.S.Gour: Penal law of India (1966 Allahabad), II, 1719-1747; Nelson's Penal Code of India (1966 Allahabad) II, 1329, 1342. See also State v Thakur Prashad A.I.R. 1959 All. 49 pr.17 p.52.

6. Sukanta Haldar v State (1959) 1 Cal. 678 at 681-2; contrast with the position elsewhere in the world (discussed infra).

is obscene,[7] found reproductions from temple architecture obscene[8] and found great difficulty in showing that ancient classics like the Kāma-sūtra are not obscene.[9]

This is in keeping with Cockburn C.J.'s test in R v Hicklin (1869)[10]

> "I think the test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those minds open to such moral influences and (in) whose hands a publication like this must fall."

The problems put forward by this test are two-fold: Firstly, from the point of view of criminal law - it tends to create a crime of strict liability, which is particularly harsh on the innocent disseminator. Secondly, from the point of view of freedom of speech, it created a legal atmosphere whereby literature had to be considered by the effect it had on children into whose hands it might fall rather than by its literary and artistic merit. This becomes all the more important when we consider that "obscenity" has come to include drug taking and violence.[11]

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7. C.T.Prim v State A.I.R. 1961 Cal. 177 at pr.11 p.180.

8. Sukanta Haldar v State A.I.R. 1952 Cal. 214. Contrast Sec.1(1) of the Obscene Publications Act 1959 but note that in R v Anderson(1971) 3 W.L.R. 939 at 945 in the case of a magazine the separate items of a magazine may be considered separately.

9. State v Thakur Prashad A.I.R. 1959 All. 49 at p.16 p.51-2; State v Kunji Lal A.I.R. 1970 All. 614.

10. (1868) 3 Q.B. 360 at 367.

11. On drugs see John Calder (Publications) Ltd. v Powell (1965) 1 All. E.R. 159. See comments in (1965) Crim.L.R. 111; (1966) 82 L.Q.R. 29; (1965) Jnl. of Cr. Law 91; On violence see R v Calder & Boyars Ltd.(1969) 1 Q.B. Comment (1969). See generally G.Zellick: Violence as pornography (1970) Crim.L.R. 188. Contrast S.150(8) of the Canadian Penal Code which while considering violence reads sex and violence conjunctively. For a general lay attitude to the problem of violence as pornography see the article of B.Levin The Times 18 May 1972 and the letter by J.H.B.Allan The Times June 20 1972.

The Hicklin test has been retained; but statutory provision in England[12] has been made for protecting the innocent disseminator[13] and to enable the Court and jury to consider expert evidence on the literary merit of a book.[14]

Some Courts (like those in New Zealand and Australia[15]) have emphasised that what should be taken into account are the "standards of the community". This is also the approach of the Canadian Courts,[16]

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12. The principle changes in England have been the Obscene Publication Acts 1959 and 1964 (on which see the comments of J.Hall Williams (1960) 23 Mod.L.R. 285 and (1965) 28 Mod.L.R. 73 respectively). For the background to the bill see R.Jenkins (who piloted the Bills): Obseanity, censorship and the law - the story of a Bill (1959) XIII Encounter 62. For a background to the old law see J.Hall Williams: Obscenity in Modern English Law (1965) Law and Contemporary Problems 630. There are some (see the report of the Arts Council: The Obscenity Laws (1969 London); the letter to The Times of G.Don Nov.13 1971) who would like to see the controls on obscenity abolished. But this has been rejected, see Hansard 793 H.C.D. cols. 1538-9 (Debate Dec.18 1969) The Times March 20 1971 (reporting the debate on March 19 1971). There are others who would like some reform e.g. T.J.O.Hickey: Confusion in the Obscenity Law The Times Nov.12 1971 and the comments of D.Walker-Smith (letter, The Times Nov.16 1972). For a general review of the pros and cons of the discussion for reform see Street: Freedom, the individual and the law (1971) Chapter 5.

13. S.2(5) of the Obscene Publications Act 1959.

14. 4(1) and (2). But see the cases cited on this infra f.n. 18

15. See R. v Close (1948) V.L.R. 445 (per Fullagar J.); Wavish v Associated Newspapers Ltd. (1959) V.R. 57; McKay v Gordon & Gotch (Australasia) Ltd. (1959) V.R. 420; Kyte Powell v Heinmann Ltd. (1960) V.R. 425. Contrast the statement in Transport Publishing Co. Ltd. v Literature Board of Review (1958) A.L.R. 177 at 180. For the position in New Zealand before the 1963 statute see Re Lolita (1960) N.Z.L.R. 817 on appeal (1961) N.Z.L.R. 542 (note the dissent of Gresson P.). All this case law is reviewed by A.G.Davis: Lolita: Banned in New Zealand (1961) 24 Mod.L.R. 768. For general accounts of the position see two recent unpublished Papers (circulated as Papers 9 and 10 for the LL.M. Course 1971-2, University of London): Rutherford Ward: Offences against Public Morals: Control of Indecent and Obscene Books in England and New Zealand (Paper No. 9); R.C.Frazer: Obscene Publications (Paper No. 10); Rutherford Ward: Books in the Dock New Society May 6 1971.

16. See in particular Ss. 150 and 150A of the Canadian Criminal Code 1953 (as amended in 1959); the leading cases on this are Brodie v Queen (1962) S.C.R. 681; Dominion News and Gifts Ltd. v Queen (1964) S.C.R. 251. The first of these was about Lawrence's Lady Chatterly's Lover, which was also impugned as "obscene" in Ranjit Udeshi v Maharashtra A.I.R. 1965 S.C. 881. For Canada see generally L.H.Leigh: Aspects of the control of obscene literature in Canada (1964) 24 Mod.L.R. 669 and R.C.Frazer (cited supra f.n.15) 4-6.

though we must remember that in Canada the emphasis is on the dominant theme of the book.[17] But in all these cases we must remember that issues like "the standards of the community" and the "tendency to corrupt and deprave" are not matters on which sociologists are allowed to express an expert opinion,[18] even though there are rare instances (particularly in a case considering the effects of pictures on children[19]) where such opinion was relied upon. In the main therefore this problem rests solely in the hands of the jury, and public opinion reflected in their judgement, rather than scientifically collected data.[20]

The problem does not end here. The standards of the community are "variable" and as Learned Hand J. put it in U.S. v Kennerly[21]

> "To put thought in leash to the average conscience of the time is perhaps tolerable but to fetter it by the necessities of the lowest and least capable seems a fatal policy."

Courts are beginning to agree that the standards for children must be different than those for the rest of society. The New Zealand Indecent Publications Act 1963 goes a step further and classifies obscenity into the following sections (vide Section 10):

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17. Note S.150(8) of the Canadian statute (supra f.n.16) states: "For the purposes of this Act, any publication the dominant characteristic of which is the undue exploitation of sex, or of sex and one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene."

18. For the position in England see R v Calder & Boyars Ltd. (1969) 1 Q.B. 151; R v Anderson (1971) 3 W.L.R. 939 at 946 (but note that reliance is put on the experts' testimony at p.948); R v Stamford (1972) The Times March 1 1972.

19. See R v A and B C Chewing Gum Ltd. (1968) 1 Q.B. 159 and note that this case was restricted to apply only to children in the last two cases cited.

20. This is a word of caution uttered by Dickson J.A. in R v Drairie Schooner News Ltd. (1970) W.W.R. 585 at 559 even though he generally admits that such evidence should be generally admitted to consider community standards.

21. (1913) 209 Fed. 119.

(a) Indecent
(b) Not indecent
(c) Indecent in the hands of a specified age
(d) Indecent unless its circulation is limited to specified persons or classes of persons
(e) Indecent unless used for a particular purpose. [22]

This tends to look at the problem from the point of view of civil liberties instead of following the line unhappily popularised in America in Roth v U.S.[23] (now considerably restricted[24]) that "obscene" publications are not really exercises in freedom of speech worthy of constitutional protection. But the criminal element still remains an important factor, and very recently Widgery C.J. said in R v Anderson (1971)[25]

> "We would like to make it clear in general terms that any idea that the offence of obscenity does not merit a prison sentence should be eradicated."

Let us turn to the Supreme Court cases. As early as 1960 the Supreme Court had made it clear in Hamdard Dawakhana v Union[26] that

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22. Note that some variations are also recognised in England and in R v Anderson (1971) 3 W.L.R. 939 at 949-50 that obscenity does not have the same meaning in the Obscene Publications Act 1959 and the Post Office Act 1953. On the standards for children see also the A and B C Chewing Gum case (cited f.n.19 supra) and Ginzburg (cited f.n.24 infra); S.292 of the Indian Penal Code 1860 gives special protection to children. See further Young Persons (Harmful Publications) Act (93 of) 1956

23. (1957) 354 U.S. 489. But note that we have already shown in Chapter III Section 3 (supra) that the Supreme Court of India adopted precisely this attitude in considering the definition of property. Contrast the attitude of Douglas J. (in dissent) that all forms of speech should be absolutely protected.

24. See the more recent cases A book named John Cleland etc. v Att.Gen. (1966) 383 U.S. 413 (note the standards of community test in the judgements of Clark and Stewart JJ.); Ginzburg v U.S. (1966) 383 U.S. 463; Mishkin v N.Y. (1966) 383 U.S. 502. Note the controversy on these cases: D.E.Engdahl: Requiem for Roth: Obscenity doctrine is changing (1969-70) 68 Mich.L.R. 185 and the reply by S.K.Laughlin Jnr. A requiem for requiems: The Supreme Court at the Bar of reality (1970) 68 Mich.L.R. 1389.

25. (1971) 3 W.L.R. 939 at 950.

26. A.I.R. 1960 S.C. 554. See Seervai (1967) 324-5 and supra Chapter III Section 3.

commercial advertisements, especially for the sale of medicines for the cure of certain types of disorders, are not an exercise in free speech. We have already had occasion to show that the Supreme Court has often used broad undefined categories to control a particular activity instead of weighing the pros and cons involved. This is very true of the attitude that Hidayatuallah J. took in Ranjit Udeshi v Maharashtra[27] where the Court considered whether Lady Chatterly's Lover was an obscene book. His lordship assumed that it was "an important interest of society to suppress obscenity"[28] and observed :

> "(I)t can hardly be claimed that that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech and expression, because the Article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge ... " 29

Later he added :

> "It is, however, clear that obscenity by itself has extremely poor value in the propagation of ideas, opinions of public interest or profit. When there is propagation of ideas, opinions and information of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression." 30

The Court therefore believes that free speech means only responsible speech and that obscenity was worthy of protection only if it had "a prepondering social purpose".[31] The Court readily took the view that what was harmful for the young must necessarily be harmful for the

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27. A.I.R. 1965 S.C. 881.

28. Ibid at pr.7 p.885 col.2.

29. Ibid at pr.8 p.885 col.2.

30. Ibid at pr.9 p.886 col.1.

31. Ibid at pr.22 p.889 col.1.

rest of society[32] and while paying lip service to the rule that the book must be considered as a whole[33] was prepared to condemn the book because of isolated passages.[34]

It is clear that the Court was also trying to improve literary standards in the country and at one stage the learned judge says :

> "Today our National and Regional languages are strengthening themselves by new literary standards after a deadening period under the impact of the English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support." [35]

Hidayatullah J. is thus anxious to get Indians away from imitative habits but continually makes the same error himself throughout his judgements.

In addition to this the Court went out of its way to examine the literary merit of the book, put Lawrence on trial, and with Hidayatuallah J. now assuming the role of literary critic, suggested that the book was written as and intended to be pornography.[36] At the same time the fact that a genuine literary critic and author, who had given evidence in the Court below, had approved of the literary merit of the book was clearly ignored.[37] One can understand the Court doing

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32. Ibid at pr.14 p.887 col.2 (quoting Hicklin's case); pr.15 (ibid) reads: "This test has been uniformly applied in India." No authority has been cited for this.

33. Ibid at pr.20 p.888 col.2.

34. Ibid at pr.29 p.891 "... the impugned passages viewed separately and also in the setting of the whole book pass the permissable limits". Note that "pass" here in its context means "exceed".

35. Ibid at pr.21 p.888-9.

36. Ibid at pr.24-28 pp.889-891.

37. Ibid at pr.3 p.884 col.2 where the Court stressed that despite the expert evidence the issue must under the terms of the Penal Code be decided by the Court. It is submitted with respect that the Penal Code merely places a general arbitral responsibility on the Court and the expert's opinion should have been given the weight that it deserved.

this if (as under a law in Massachusetts[38]) the book and not the persons connected with it were put on trial. But in this case a person was on trial for what could have been regarded as innocent dissemination. We cannot help thinking that while the Court was playing this multi-role of critic,-censor-patron and protector of the young, the position of the appellants, who were after all only innocent disseminators of a controversial work, was not really considered by the Court. The Court unceremoniously rejected the argument that intention was not proved by suggesting that it was not really required because two American decisions on the question of "scienter"[39] were so evenly divided that it was difficult to take the view that it was important![40] The Court quoted the important cases before the Obscene Publications Act 1959; introduced little anecdotes from the lives of Dr. Johnson and John Wilkes;[41] talked generally about art and literature;[42] but ignored some of the basic considerations of the law of obscenity, It is clear that the Court has tried to combine the functions of judge, jury, expert and social

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38. For a review of the Massachusetts legislation see G.Zellick: A new approach to the control of obscenity (1970) 33 Mod.L.R. 289. Note also the Indecent Publications Act 1963 (of New Zealand) where the book can be referred to a Tribunal. For further discussion on this see Rutherford Ward: Books in the Dock New Society May 6 1971. But in New Zealand there must nevertheless be the prosecution of a person and not just of a book, however expert the Tribunal may be.

39. It is a well known principle of criminal law that a person must "intend" (mens rea) his impugned criminal action. See Smith & Hogan: Criminal Law (1969 London) 37-53 and on obscenity at 494-7.

40. A.I.R. 1965 S.C. 881 at pr.12 p.896 col.2. One must mention in passing that on the question of obscenity all American decisions have been evenly decided (see cases cited in f.n.24 supra). Again there were 5 judgement in Golak Nath v Punjab A.I.R. 1967 S.C. 1643 (one of them Hidayatullah J.'s) that hardly means that the decision is not an authority for what it decided.

41. Ibid at pr.11 p.886 col.2 and pr.21 p.888 col.2.

42. e.g. ibid at pr.16 p.887-8, pr.18 p.888, and prs.24-8 pp.889-91.

reformer, and the result is a very confused law of obscenity. It is for this reason that in Chandrakant v Maharashtra[43] P. J. Reddy J. ostensibly followed Ranjit Udeshi(s case[44] and seemed to tidy up certain unexplained parts of the law. Thus it is made clear that the book must be taken as a whole,[45] that the Court will not sit in judgement on the style of the book (which it may not be competent to understand[46]) and that what the Court had to consider was

> "whether a class, not an isolated case, into whose hands the book ... falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds." 47

Certainly some of the débris has been cleared, but even the latest judgements deal with the broad categories of social reform considered by HidayatullahJ. rather than considering the legal aspects of the matter and considered the role of the Court in that light.

The Supreme Court has in fact taken a traditional view that the Court (or the Government) must defend and uphold a particular moral view of a society[48] and establish and enforce certain standards, while at the same time attempting to show that in fact it is really in line with contemporary jurisprudence and sophisticated enough to understand the literary nuances of the problem placed before it.

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43. A.I.R. 1970 S.C. 1390.

44. Ibid at pr.5 p.1392-3.

45. Ibid at pr.5 p.1392 (qhoting from Hidayatullah J.) and note the comment at the end of the para on p.1393.

46. Ibid at pr.4 p.1392. But note that his remarks can be limited to the faet that the book was in a regional language which the Court was not familiar with.

47. Ibid at pr.13 p.1395 col.2.

48. On the functions of the Indian State see references cited infra Chapter VII Section 2 f.n.3.

ii. Contempt of Court by scandalising the Judges.

A foreign observer was keen enough to notice that the law on contempt of Court is stricter in India than elsewhere.[49] This is borne out by the cases decided on this point both by Indian[50] and Pakistan High Courts[51] where the Courts have been more keen to protect the dignity of the judge than to look at the matter from the point of view of freedom of speech.[52]

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49. Grossman: Freedom of speech and expression in India (1957) 4 U.C.L.A.L.R. at p.64.

50. See for example the following High Court cases: Gulab Singh v D.M. A.I.R. 1950 All. 11 (F.B.); Kapur Singh v Jagat Narain A.I.R. 1951 Punjab 49; V.P. v Baij Nath A.I.R. 1961 V.P. 14; Sukhdeo v Brij Bhushan A.I.R. 1951 All. 667; Re Sudhir Chand A.I.R. 1952 Cal. 258; Railway Magistrate v Rajjanlal A.I.R. 1952 M.B. 176 (really a case of contempt in the face of the Court); State v E & P of E. T. & P A.I.R. 1952 Orissa 318; Mahabir Prashad v State A.I.R. 1953 M.B. 60; State v Vikar Ahmed A.I.R. 1954 Hyd. 175; Legal Remembrancer A.I.R. 1955 Pat.135; State v Pursharti Gazette A.I.R. 1955 N.U.C. 736 (Punjab); State v Sadhu Saran Singh A.I.R. 1955 N.U.C. 1866 (Pat.); State v Debi Neogi A.I.R. 1955 N.U.C. 2868 (Cal); H.E.H.Nizam v B.G.Keskar A.I.R. 1955 Hyd. 264; State v Rajeshwari Prashad A.I.R. 1966 All. 588; State v Kulmani Singh A.I.R. 1966 All. 495; Adv.Gen. v Sashagiri Rao A.I.R. 1966 A.P. 167; State v Raghubar Sahai A.I.R. 1967 All. 586; Adv.Gen. v Ramana Rao A.I.R. 1967 A.P. 299; B.K.Lala v R.C.Dutt A.I.R. 1967 Cal. 153; Re Vinod Maheshwari A.I.R. 1967 M.P. 104; Adv.Gen v Abbaraju Ramarao A.I.R. 1968 A.P. 207; Adv.Gen v Laxminarayan A.I.R. 1968 A.P. 370; Sher Singh v R.P.Kapur A.I.R. 1968 Punjab 217;(F.B.); Sarat Chander v Surendra A.I.R. 1969 Orissa 117; Re Hiren Bose A.I.R. 1969 Cal. 1 (S.B.); Abdul Jabbar v R.K.Karanjia A.I.R. 1970 Bom.48.

51. See for example Snelson v Judges of High Court of Pakistan P.L.D. 1961 S.C. 237 (where the appellant had merely criticised the judgements of the Court in a lecture and declared his inability to understand them). More recently the Court has refused to make a distinction between the administrative and judicial functions of the Court: Abdul Qayum v Chief Justice and Judges of the High Court of Pakistan P.L.D. 1971 S.C. 238; Mohsin v State P.L.D. 1965 S.C. 28; See also State v Adam P.L.D. 1965 Kar.45 (where the statement was part of the application for transfer); State v Ezaz P.L.D. 1971 Lah. 445.

52. This is guaranteed by the Constitution, though provision is made to protect the law in the interest of contempt of Court. See Article 19(1)a of the Constitution and read with Article 19(2). On the Constitutional aspects see the brief discussion by Seervai: (1967) 325-328.

Chief Justice Sikri has justified this on the ground that the situation in India is peculiar, vaguely hinting that the status oriented thinking of the Indian people necessitates that the Courts be accorded further protection.[53] More recently Parliament has passed the Contempt of Courts Act (1971), giving greater protection to the judges.[54]

All this contrasts with the position in England and America.[55] As early as 1900[56] it was suggested that the power to punish for scandalising the judges was obsolete. Although it has since been used in a couple of cases,[57] it has generally fallen into disuse.[58] It is generally accepted that the power to prosecute for contempt as a recent report[59] suggests is limited to where the publication would

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53. At a meeting at the Institute of Advanced Legal Studies, June 21 1971 answering a question raised by the present writer.

54. See the newspaper report: Contempt of Courts Bill Passed by the Lok Sabha Statesman Weekly Dec.25 1971.

55. On the position in England see generally Smith & Hogan: Criminal Law (1969) 14-16; Street: Freedom, the individual and the law (1971) 170-76; On the position in America see R.C.Donnely & R.Goldfarb: Contempt by Publication in the United States (1961) 24 Mod.L.R. 239.

56. See Mcleod v St. Aubyn (1899) A.C. 549; Contrast R v Gray (1900) 2 Q.B. 36 at 40. Both these cases are relied on by Hidayatullah C.J. in E.M.S.Namboodripad v T.N.Namiar A.I.R. 1970 S.C. 2015 at pr.8 p.2018.

57. See R v New Statesman (1928) 44 T.L.R. 301; R v Colsey The Times May 9 1931 and see the comment (1931) 47 L.Q.R. 315.

58. See for example the latest judgement in R v Metropolitan Police Commr. exparte Blackburn (1968) 2 All.E.R. 319. See also the remarkable judgement in Craig v Harney (1947) 331 U.S. 367 where the person was not convicted even though he made adverse comments about the conscience of the judge.

59. See the Justice Report: Contempt of Court (1960) 14-16.

prejudice a trial,[60] and the power to convict for "scandalising" has been limited (as two cases[61] from New Zealand and Canada suggest) to instances where the judges are accused of partiality and corruption.

The Supreme Court of India has decided ten important cases on contempt by scandalising;[62] three of which involve direct allegations of corruption,[63] two concern allegations of class bias,[64] two make the general charge that the judge might have been politically motivated,[65] one case involves the comments on a pending case by the Chief Minister of a State which suggests that comments which interfere with justice may amount to a case of contempt by scandalising,[66] and one suggests incompetence on the part of the judges.[67]

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60. See for example Sheppard v Maxwell (1966) 384 U.S. 333 where the judge and prosecuting attorney were fighting an election for judgeship and used the case before them as a platform; R v Savundranayagam (1968) 1 W.L.R. 1761 at 1765 where Lord Denning deprecated the extensive use of television interviews before a trial. Note that even in this area certain procedural limitations have been imposed, the innocent publisher protected and a right to appeal granted by Sec.11-13 of the Administration Act 1960 (commented on B.W.M.Downey (1961) 24 Mod.L.R. 261 at 263-4).

61. See R v Glanzer (1962) 38 D.L.R. (2d) 402 (per McRuer J.); Re Wiseman (1969) N.Z.L.R. 55.

62. Ramakrishna Reddy v Madras A.I.R. 1952 S.C. 149; Ashwini Kumar v Arabinda Bose A.I.R. 1953 S.C. 75; Brahma Prakash v U.P. A.I.R. 1954 S.C. 10; Hiralal Dixit v U.P. A.I.R. 1954 S.C. 743; R.C.Cooper v Union A.I.R. 1970 S.C. 1318; Re P.Sen A.I.R. 1970 S.C. 1821; E.M.S.Namboodripad v T.N.Nambiyar A.I.R. 1970 S.C. 2015; Perspective Publications v Maharashtra A.I.R. 1971 S.C. 221; C.K.Daphtary v O.P.Gupta A.I.R. 1971 S.C. 1132; Dinabandhu v Orissa A.I.R. 1972 S.C. 180. Note also the comments of N.G. Shelat (Retd. Judge): Contempt of Court (1972) 13 Guj.L.Rep. Jnl. 1-12 taking an ambivalent attitude to the law on contempt, but defending the Suprement Court judgements.

63. Ramakrishna Reddy v Madras A.I.R. 1952 S.C. 149; Perspective Publications v Maharashtra AII.R. 1971 S.C. 221; C.K.Daphtary v O.P.Gupta A.I.R. 1971 S.C. 1132.

64. R.C.Cooper v Union A.I.R. 1970 S.C. 1318; E.M.S.Namboodripad v T.N. Nambiar A.I.R. 1970 S.C. 2015.

65. Hira Lal Dixit v U.P. A.I.R. 1954 S.C. 743; Brahma Prakash v U.P. A.I.R. 1954 S.C. 10.

66. Re P.Sen A.I.R. 1970 S.C. 1821 at pr.8.

67. Ashwini Kumar v Arabinda Bose A.I.R. 1953 S.C. 75.

The judgements in cases where allegations of bribery and corruption are made are quite clearly right, though one must have some reservations about the statement in C. K. Daphtary v O. P. Gupta[68] that to say that one particular judge "toed the line" was contempt. This is taking the protection of judges too far for, as we have shown,[69] the leading judgement writer plays a very dominant role and it would be a mistake to punish any statement analysing the varying contributions of the judges in particular cases. The statement made by the Court in this regard is much too wide and must be confined to its facts.[70]

As regards other cases the Court was in the early fifties willing to accept comment and criticism. As Mukherjea J. put it in Ashwini Kumar v Arabinda Bose[71]

> "We would like to observe that it is not the practice of the Court to issue such rules except in very grave and serious cases and it is never over-sensitive to public criticism."

But at the time the Court was quick enough to punish any attempt which might undermine their status. Thus in Ashwini Kumar v Arabinda Bose the judges thought that the suggestion that politics and religion have no place in the Courts of law was contempt. The Court said :

> "It is obvious that if an impression is created in the minds of the public that the judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community is bound to be undermined and no greater mischief than that can possibly be imagined ... (;) where there is danger of great mischief being done in the matter of administration of justice, the animadversions

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68. A.I.R. 1971 S.C. 1132 at pr.80 p.1143 col.2.

69. See generally Chapters III and IV (supra) and Chapter VIII (infra).

70. We must remember that in this case the judgement writer was accused of "toeing the line" under pressure from the senior judge with whom he formed the Bench.

71. A.I.R. 1953 S.C. 75 at pr.3 p.76 col.1.

cannot be ignored with equanimity." 72

His lordship's reliance on Ambard v Att.Gen.[73] was unfortunate, for in that case Lord Atkins condoned severe criticisms of the Courts' sentencing policy. Again in Hira Lal Dixit v U.P.[74] Das J. held that the suggestion that post-judicial appointments may tend to make the Court pro-Government was contempt, even though it was made clear in the impugned article that "this has so far not made any difference in the firmness and justice of the Hon'ble judges." Indeed, if the rationale of this judgement was strictly applied a large part of the 14th Report of the Law Commission would in fact be "contempt".[75] The more recent unreported case Re Basudeo Prashad[76] suggested that the Court is more willing to accept criticisms of the system of judicial administration from those entitled to make them.

Again the decision in Brahma Prakash v U.P.[77] which considered the allegation that some magistrates were incompetent contrasts unfavourably with the recent decision ofthe Court of appeal in R v Metropolitan Police Commr. exparte Blackburn[78] which clearly laid down that there was no contempt in the case even though the statements made were inaccurate. The Supreme Court of India has found it difficult to distinguish the latter case.[79]

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72. A.I.R. 1953 S.C. 75 at 76 col.1.

73. A.I.R. 1936 P.C. 141

74. A.I.R. 1954 S.C. 743 at 746.

75. The Report makes a frank and critical assessment of the Indian Judicial system.

76. Crim.App.No.110 of 1960 (decided May 31 1962) referred to in E.M.S.Namboodripad v T.N.Nambiar A.I.R. 1970 S.C. 2015 at pr.10 p.2019.

77. A.I.R. 1954 S.C. 10 at 15.

78. (1968) 2 All.E.R. 319.

79. See E.M.S.Namboodripad v T.N.Nambiar A.I.R. 1970 S.C. 2015 at pr.7 p.2018.

More recently the Supreme Court has been criticised for assuming an inegalitarian role while considering the import of the Court's interpretation of the fundamental right to property. The Court has considered any attempt to describe its decisions as unfair, or biased in favour of the middle class, as contempt. Thus comments that the Bank Nationalisation case[80] was wrongly decided and lowered the prestige of the judiciary was considered contempt of Court in R.C.Cooper v Union.[81] Hidayatullah J. went on to suggest that judges were less fallible than others and the fact that they play an overall arbitral role must not be overlooked :

> "No one is more conscious of his limitations than a judge but because of his training and the assistance that he gets from learned counsel he is apt to avoid mistakes more than others. Further the supremacy of a legislature under a written Constitution is only what is within its power but what is within its power and what is not, when any specific act is challenged, it is for the Courts to say. If thatwere realised much of the misunderstanding would be avoided and the organs of the government would function truly in their own sphere." 82

It appears that the Court wanted to-assert that its constitutional responsibility accords them a role at least co-equal with that of the legislature and the Court would expect the respect due to them concomitant with that position :

> "Respect is expected not only from those to whom the judgement of the Court is acceptable but also from those to whom it is repugnant." 83

The picture that emerges is very much that of a feudal landlord extracting tribute from his serfs and punishing any criticism as an indiscretion.

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80. Discussed supra, Chapter III, as R.C.Cooper v Union A.I.R. 1970 S.C.564

81. A.I.R. 1970 S.C. 1318.

82. Ibid at pr.6 p.1320.

83. Ibid at pr.6 p.1321.

By far the most interesting example of self protection is E. M. S. Namboodripad v T. N. Nambiyar[84] where the appellant (a Marxist Chief Minister from Kerala) was accused of contempt because he said that it was clear from Marxist principles that Courts in India suffered from class bias. The actual decision in this case that this was contempt has been supported[85] and is in accord with an Australian decision on the same point.[86] But what is significant is that Hidayatullah C.J. went out of his way to make a rough-and-ready summary of the doctrines of Marxism to show that even Marxism believes in the independence of the judiciary in a bourgeois state.[87] The Court actually reduced the fine of the appellant because they had exposed his error about Marxism. It appears that the Court went out of its way to display its knowledge of Marxism[89] because the counsel for the appellants

> "sneered that many people learn about Marxism through Middleton Murray !" 90

This lecture on Marxism can be justified on the grounds that the Court was willing to condone a bona fide error, but there is nothing in the judgement that suggests this. The judgement suggests that the Court wanted to avoid the charge of ignorance as well as bias. Indeed the tone of the judgement suggests that the Court occupies an important position in the democratic setup[91] and is not willing to accept criticism

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84. A.I.R. 1970 S.C. 2015.

85. Seervai: Supreme Court and Contempt of Court (1971) 73 Bom.L.R. Jnl. 5. But note that he too deprecates the Court's general lecture on Marxism.

86. Dunbanin (1935) 53 C.L.R. 434. Note particularly Rich J. at 442-3.

87. A.I.R. 1970 S.C. 2015 at pp.2019-2023.

88. Ibid at pr.34 p.2025-5.

89. See supra f.n.87.

90. Ibid at pr.27 p.2023.

91. Ibid at pr.30 p.2023-4.

> "which is calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions." 92

Some aspects of Hidayatullah J.'s comments on Marxism are incomplete,[93] and as the appellant himself has shown, the general comments made on the position of the judges in Marxist theory are clearly misleading.[94] The Court's effort to acquire theoretical respectability was hardly necessary and reflects on the Court's desire to extract respect even from left-wing politicians. It would seem that the Court underrated the complexities of the criminal-law aspect of the problem, and considered the importance of critical commentary as a means to develop the law, only in passing.[95] Hidayatullah J. suggests that the Indian Supreme Court's position is like that of the American Supreme Court during the New Deal,[96] but despite his brief approval of American law[97] clearly ignores the fact that in America the "clear and present danger" applied to this area.[98]

The Court's desire to justify its decision by appealing to the principles of Marxism and its awareness of them, is really yet another indication of the fact that status-oriented thinking is an important part of the Court's jurisprudence while considering the

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92. Ibid at pr.31 p.2024.

93. Ibid at pr.16 p.2020 where his lordship tries to sum up the whole of 3 volumes of Das Kapital in one paragraph without even analysing the Marxist theory of cycles and crisis. Again Marx's theory of alienation has been clearly ignored altogether, although it is an important component of Marxism.

94. See Namboodripad's letter (1971) K.L.T. Jnl. 2-6.

95. A.I.R. 1970 S.C. 2015 at pr.11 p.2019; at pr.32 p.2024.

96. Ibid at pr.30 p.2024.

97. Ibid at pr.12 p.2019.

98. See the articles cited f.n.55 supra. p 559.

offence of scandalising the judges. The fact that the Court believes that the Constitution has assigned to it an important role has given further stimulus to its view. The result is that the importance of criticial comment in developing the law is overlooked. One always regrets that in contempt cases the maxim "nemo judicet in causa sua" ("a man must not be a judge in his own cause") is peculiarly difficult to observe. Hence most Courts are exceptionally careful to rest their decisions on objective criteria. These decisions are clearly policy decisions and one cannot help thinking that the remark "others abide our question, thou art free" may well have been true of Shakespeare, but it is certainly not true of the Supreme Court and ought not to be so.

iii. State privilege as to documents

a. Background to the problem.

The relationship between the judiciary and other arms of the State can be viewed from yet another angle., viz. its attitude to Official Secrecy in procedural matters. In addition to discussing the general problem of Official Secrecy we shall make an extended analysis of the Supreme Court decision on the subject, because it is an excellent example of statutory interpretation in India and the manner in which different judges selectively use precedent to suit their own purposes.

The problem of Official Secrecy has aroused great interest

in England amongst lawyers[99] as well as the Government.[100] The problem of Crown privilege has also received a lot of attention,[101] so much so that the Law Reform Committee on Privilege in Civil Proceedings thought that it should be the subject of a special report.[102]

More recently, in Conway v Rimmer,[103] the House of Lords upset a long line of authority which culminated in

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99. See D.G.T. Williams : Not in the Public Interest (1965); J. R. Wiggins : Freedom or Secrecy (1964 - revised edn.); Street : Freedom, the individual and the law (1971) Chapter 8; Williams : Official Secrecy in England (1968) 3 Fed. L. R. 20.

100. See e.g. Grigg Report on Departmental records (1954) Cmnd. 9163; Radcliffe Report on Security Procedures in the Public Service (1962) Cmns. 1681; Report of Privy Councillors on "D" notices (1967) Cmnd. 3309; White Paper on the "D" notice system (1967) Cmns. 3312; Statement of the findings of Privy Councillors on security (1956) Cmnd. 9715; Report of Privy Councillors on the interception of communication (1957) Cmnd. 283; Reports of the Security Commission Cmnd. 2722 of 1965; 3151 of 1961; 3365 of 1967. A good deal of the controversy has centred upon the Official Secrets Acts, which have been described by an M.P. and ex-Minister as a "refuge for incompetence" (see Hugh Fraser's article in The Times Nov. 17, 1970 p.10); a view which received endorsement from academic quarters (see the Letter of Prof. H. Thomas: The Times Nov. 21 1970) although evoking a corresponding protest from a civil servant (The Times Nov. 24, 1970). One of the main obstacles of reform, as the former Attorney General Sir Elwyn Jones suggests, is that the matter cannot be left to the Courts since "the public interest cannot be properly decided by a judge." (quoted in Fraser's article supra)

101. e.g. D.H.Clark : Administrative Control of Judicial Action ... (1967) 30 Mod.L.R. 489; de Smith : Judicial Review of Administrative Action (1969) Appendix III.

102. (1967) Cmnd. 3472 at pr. 7.

103. (1968) 1 All. E.R 874.

the "Thetis" case[104] and ruled that the Court could examine the document for itself and see if the claim for privilege was justified.[105]

There is a tenuous line of authority which suggests that the Courts do have the power to enquire whether the document for which

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104. (1942) A.C. 624. The long line of authority includes R v Watson (1817) 2 Stark 116; Home v Bentinck (1820) 129 E.R. 907; Earl v Vass (1822) 1 Sh.Sc.App. 229; Homer v Ashford (1825) 3 Brig. 322; Smith v East India Co. (1841) 1 Ph. 50; Wadeer v East India Co. (1856) 4 W.R. 421; Beatson v Skene (1860) 157 E.R. 1415 (note the dissent of Martin B.); H.M.S. Bellerophon (1874) 44 L.J.Adm. 5; Hennessy v Wright (1888) 21 Q.B.D. 509; Hughes v Vargas (1893) 9 T.L.R. 551; Chatterton v Secy of State for India (1895) 2 Q.B. 189; Re Joseph Hargreaves (1900) 1 Ch. 673, but the point on privilege is mentioned only at 20 T.L.R. 258; Williams v Star Newspaper Ltd. (1908) 24 T.L.R. 297 (though here the Court appears to have said that prison reports ought to be produced); West v West (1911) 27 T.L.R. 189 (refusal of the Lord Chamberlain to answer a question, upheld); Ronnfeldt v Phillips (1918) 34 T.L.R. 556; Anthony v Anthony (1919) 35 T.L.R. 559; Ankin v L.N.E.Rly (1930) 1 K.B. 527 (where despite the statutory mandate that railway companies must report accidents, Scrutton L.J. did not order the documents to be produced); Ellis v Home Office (1953) 2 Q.B. 135 (note Devlin J.'s plea that the powers of the Court be increased. We must note however that in Conway v Rimner Reid L.J. said of the earlier cases that "most if not all" dealt with matters which were "political or at least of a more important character than ordinary routine reports". Moreover in some cases evidence as to the contents of the documents was allowed. See for example Williams v Star Newspapers (supra); Anthony v Anthony (supra), though in some cases even this was objected to successfully (e.g. West v West (supra); Chatterton v Secy of State for India (supra)).

105. In Conway v Rimner No. 2 (1968) 2 All.E.R. 304 the Court held that the claim for privilege was not justified.

privilege is requested is connected with affairs of state.[106] But this line of authority is less definite that the Scottish line of cases which allow the Court to examine a document for itself to see if the claim was justified.[107] The position is the same in America even though the leading case on the subject in America is a wartime case like the "Thetis" case.[108] We have set out the case law on the subject clearly to show the selective referencing of the Indian judges.

The Indian law on the subject is contained in Sections 123 and 162 of the Indian Evidence Act 1872 :

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106. Note the dissent of Martin B. in Beatson v Skene (supra f.n.104) where even Pollock C.B. admitted that Martin B. could have been right (on this see the comments of Morris L.J. in Conway v Rimner (1968) 1 All. E.R. 874 at 895-6); Stace v Griffith (1869) L.R. 2 P.C. 420, where Lord Chelmsford said that the trial judge ought to have considered whether the document was official or not; Kain v Farrer (1877) 37 L.T.R. 469 where Grove J. ordered a further affidavit from the Admiralty; Hennessy v Wright (1888) 21 Q.B.D. 509 where Field J. made an obiter observation that he had the power to call up the documents for inspection (Note how in Union v S.S.Singh A.I.R. 1961 S.C. 493 different judges make different uses of this case - e.g. Gajendradkar J. at pr.39 p.510; Kapur J. at pr.75 p.523); Marks v Beyfus (1890) 25 Q.B.D. 494 (names of informants - note Esher M.R.'s view that the rule about state privilege could be departed from); Re Joseph Hargreaves (supra f.n.104) where Lindley M.R. reserved comment on the extent of the power; Leigh v Gladstone (1909) 26 T.L.R. 139 (reports by medical officer on forced feeding in prisons not privileged but note the comments of Morris L.J. in Conway's case (1968) 1 All.E.R. 874 at 899); Asiatic Petroleum Co. v Anglo Iranian Co. Ltd. (1916) 1 K.B. 822 where Scrutton L.J. inspected some documents, but note the same judge's observations in Ankin's case (supra f.n.104); Robinson v State of Australia A.I.R. 1931 P.C. 274; Spiegelman v Hocker (1933) 50 T.L.R. 87; For criticisms of the rule see Devlin J. in Ellis v Home Office (supra f.n. 104); Merrick v Nott Bower (1965) 1 Q.B. 57; Wednesbury Corpn. v Minister of Housing & Local Government (1965) 1 W.L.R. 261; Re Grosvenor Hotel No. 2 (1965) Chn. 1210.

107. See Glasgow Corpn. v Central Land Board (1956) S.C. (H.L.) 1 reconciling Earl v Vass (1822) (supra f.n.104) and Admiralty Commr. v Aberdeen Steam Trawling and Fishing Co. (1909) S.C. 335 with the main stream of Scottish law.

108. U.S. v Reynolds (1952) 345 U.S. 1 (per Vinson C.J.).

"Sec.123. No one shall be permitted to give any evidence derived from any unpublished official records relating to any affairs of state except with the permission of the Officer at the head of the Department concerned, who shall give or withhold such information as he thinks fit."
Sec.162 "A witness summoned to produce a document shall if it is in his possession and power bring it to Court, notwithstanding any objection which there may be to its production or to its admissability. The validity of any such objection shall be decided on by the Court.
The Court if it sees fit may inspect the document, unless it refers to matters of state or to take evidence to enable it to determine on its admissability."

The controversy has centred upon the last phrase in Section 162 and the extent to which the Court can take evidence on the contents of the documents. Courts in India tend to rely on the wording of the Act rather than English law.[109] Thus in V. Chettiar v S. Chettiar (1908),[110] privilege was claimed for an Income Tax statement; the Court followed the Act rather than Re Joseph Hargreaves[111] on the same subject. But the conservative English attitude protecting Crown privilege seems to have seeped through as can be seen from two notable cases. The first of these cases, W. S. Irwin v D. J. Reid,[112] was later dissented from in Ijat Ali v K. E.,[113] and the second, Nazir Ahmad v K. E.,[114] was also later dissented from in a case from East Punjab.[115] There are a lot of cases where the Courts have not accepted

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109. See Sarkar on Evidence (1953 Edn.) 1026-1034.

110. (1908) 32 Mad. 62.

111. (1900) 1 Ch. 347. But note that the Court did rely on the English case of Lee v Birrel 3 Camp. 337.

112. A.I.R. 1921 Cal. 282

113. A.I.R. 1943 Cal. 539.

114. (1945) 26 Lah. 219.

115. G. G. v Peer Mohd. A.I.R. 1950 E.P. 228.

the plea of privilege.[116] Equally, there are also a large number of cases where the claim for privilege was allowed, covering a large variety of circumstances from telegram cables, matters under the Sea Customs Act and cases on promotion.[117] Conway v Rimner has been generally ignored except in two cases.[118]

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116. Most of the examples are taken from after 1950 after the promulgation of the Constitution. See R.M.D.Chamarbangwala v Y.K.Papria A.I.R. 1950 Bom. 230; G.G. v Peer Mohd. A.I.R. 1950 E.P. 228; Apparao v Syryaprakash (1951) 1 M.L.J. 526; Debajyoti v Dr. Nalinakshya A.I.R. 1954 Cal. 216; Tirath Ram v H.H.Govt. of J.K. A.I.R. 1954 J.K. 11; Ajit Singh v Ashwini Kumar A.I.R. 1955 N.U.C. 1011 (Punjab per Kapur J.); R.S.Anand v U.P. A.I.R. 1955 N.U.C. 2769 (All.); Public Prosecutor v Venkatanarsayya A.I.R. 1957 A.P. 486; Krishna Nandan v State A.I.R. 1958 Pat. 166 (but Sahai J. hoped that the privilege would not be claimed in future); Ramchandra v Alagirswami A.I.R. 1961 Mad. 450; Union v Indra Deo A.I.R. 1963 Pat 129 on appeal A.I.R. 1964 S.C. 1118; Union v S.Kumar A.I.R. 1963 Orissa 111; Kalliath v Kerala A.I.R. 1964 Ker. 274; Union v Raj Kumar A.I.R. 1967 Punj. 387; H.S.Bande v State A.I.R. 1967 Bom. 174 (about a conciliator's report); Suryamani v State A.I.R. 1967 Orissa 189; Excelsior Film Exch. v Union A.I.R. 1968 Bom. 322; Joti Prashad v Addl. Civil Judge A.I.R. 1968 All. 42; Naranjan v State A.I.R. 1968 Punj. 255; Ramasrinivasan v Shanmughan A.I.R. 1970 Mad.378; Kotah Match Factory v State A.I.R. 1970 Raj. 118.

117. See for example Iqbal Ahmad v Bhopal A.I.R. 1954 Bhop. 9 (arrest and documents connected with it); Madras v B.H.Hattaki A.I.R. 1954 Mad. 926 (on what is "head of department" see prs. 7 and 8 for English decisions); Re Suryanarayana A.I.R. 1954 Mad. 278 (a case of Black-marketing); R v Sultan Ahmad A.I.R. 1955 N.U.C. 6154 (a Pakistan case on proceedings against a clerical cadre subordinate); Krishna Nandan v State A.I.R. 1958 Pat. 166; E.B.Souza v J.K.Souza A.I.R. 1958 Cal.400 (knowledge based on privileged document not admissible); Harbhajan Singh v Punjab A.I.R. 1961 Punj. 215 (involving a former Chief Minister's son). American decisions that an acquittal should be granted where the Government claims privilege were not accepted; Firm Mohiuddin v J.K. A.I.R. 1961 J.K. 21 (involving commercial activities); S.B.Chowdhry v M.P.Changkati A.I.R. 1960 Assam 210 (Mehrotra J. considering a large amount of case law); H.P.Gupta v U.P. A.I.R. 1963 All. 415; Ganga Ram v Union A.I.R. 1964 Pat. 444; Pulin Behari v State A.I.R. 1965 Tripura 33 (an inconclusive case on the meaning of "head of department"); V.Dasan v Kerala A.I.R. 1963 Ker. 63; G.Subba Rao v K.B.Reddy A.I.R. 1967 A.P. 155 (on an election matter); Lakshmandass v State A.I.R. 1968 Bom. 400 (on Sea Customs Act and cables received by the Government); H.Rodney v Delhi Admin. A.I.R. 1970 Delhi 247 (promotion);

118. Ram Srinivar v Shanmughan A.I.R. 1969 Mad. 378; R. Ramanna v State A.I.R. 1971 A.P. 197 at 205-6, 209.

b. Union of India v S. S. Singh[119]

The Supreme Court first considered the problem in S. S. Singh's case which has been followed by all Courts including the Supreme Court,[120] thought there is a notable Punjab case where the Court took a common-sense view of the problem and refused to allow the claim for privilege to camouflage official misconduct.[121]

S. S. Singh's case is a curious case. To begin with the arguments of another case from Bombay were transferred to this case, the Bombay case having been decided by consent. The Bombay counsel (Mr. H. M. Seervai) was thus able to play the role of "intervener" and present a wider view of the problem.[122] Secondly, we must not forget that the plea for privilege was in fact made with respect to the proceedings of the "PEPSU" cabinet and the Report of the Public Service Commission about the removal of a District and Sessions judge.

The three judgements took up different stands. Gajendragadkar J. (for Sinha C.J. and Wanchoo J.) felt that the Courts had the power to enquire whether the documents were official or not and take evidence to that effect. Kapur J. stuck to the orthodox English view and denied the right to take evidence,[123] and Subba Rao J. felt that the only

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119. A.I.R. 1961 S.C. 493. For comments see S.Rajgopalan: (1963) Lawyer 181 at 186-187. The article characteristically discusses English law rather than Indian; The Law Reform Group: The law regarding privileged documents and communications made in official confidence (1966) 68 Bom. L.R. Jnl. 82-88.

120. See Union v Indra Deo A.I.R. 1964 S.C. 1118; Amarchand v Union A.I.R. 1964 S.C. 1158; Sub.Div.Off. v Srinivas A.I.R. 1966 S.C. 1164; Hussain Umar v Dalip Singhji A.I.R. 1970 S.C. 47 (where no case law is cited at all).

121. Niranjan Das v State A.I.R. 1968 Punj. 255 at pr.28.

122. On interveners generally see supra Chapter II Section 5. In the instant case the contribution of Mr. Seervai is indicated by Gajendragadkar J. at prs. 5, 8, 10-11.

123. A.I.R. 1961 S.C. 493 at pr.50 p.513.

"limitation on the Court was that they could not inspect the document.[124] But what makes these conclusions interesting is that all the judges rely on English law and Common law categories.[125]

Gajendragadkar J. realised that the law in India was different bcause of the provisions of Section 162 and relied on Indian case law.[126] He stressed that the Courts had to be vigilant in view of the extending powers of the State but at the same time took care to justify the "Thetis" case and soften the effect of Robinson v Minister[127] (a case from Australia) where the Privy Council had given wider powers to the Court. His reference to English law is therefore selective. He emphasised the statutory reason for the decision in Smith v East India Co.,[128] stressed Martin B.'s dissent in Beatson v Skene,[129] mentioned that Lord Thankerton and Lord Russell of Killowen were party to both the "Thetis" case as well as Robinson's case,[130] read Devlin J.'s reservations about the existing state of law in Ellis v Home Office[131] with Field J.'s obiter in Hennessy v Wright[132] (which really went the other way),[133] Asiatic Petroleum Co. Ltd. v Anglo Persian Oil Co. Ltd.[134] and Spiegelman v

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124. Ibid at pr.97 p.528.

125. See Gajendragadkar J. at prs. 33-8 pp.507-510; Kapur J. at pr.71 pp.522-3; Subba Rao J. (summary paragraph) pr.105 pp.531-2.

126. Ibid at pr.28 p.506; see also pr.31 p.507.

127. Ibid at pr.36 p.509. Note also the reference to C.K.Allen: Law and orders (2d.) 374 f.n.5a.

128. (1841) 41 E.R. 550. Ibid at pr.7 p.499. Note that the references to the cases cited in the text are given in earlier footnotes.

129. Ibid at pr.9 p.500.

130. Ibid at pr.32 p.507.

131. Ibid at pr.39 p.510.

132. Ibid at pr.39 p.510.

133. Note that Anthony v Anthony (supra f.n.104) follows Hennessy v Wright as supporting the claim forprivileges.

134. Ibid at pr.39 p.510.

v Hocker,[135] and took care to mention that the two Indian decisions that had followed the strict English law had themselves been overruled.[136] It is clear from his lordship's analysis of Glasgow v Central Board[137] that he was trying to find a compromise solution from the English case law, while at the same time trying to make it appear consistent.

Kapur J. however stuck to the orthodox English position and even observed :

> "The correct way of looking at the Indian statute ... is to interpret it in the manner which is in accord with the English law i.e. the Court has not the power to override ministerial certificate against production." 138

But his references to the English cases are also selective. He thus quotes from Lord Kinnear in Admiralty Commr. v Aberdeen Steam Trawling Co.[139] and Eldon L.C. in Earl v Vass[140] but omits to mention the treatment that those cases got in Glasgow Corpn. v Central Land Board.[141] Again he quotes Isaacs J. in Marconi Wireless Co. v Comm.[142] overlooking the different interpretation of that case in Robinson's case.[143] He wants

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135. Ibid at pr.39 p.510-11

136. Ibid at prs. 29-30 pp.506-7. The decisions in question are discussed in the text correspnding to f.n. 112-115.

137. Ibid at pr.38 p.509-11.

138. Ibid at pr.84 p.525. We can see from our references (supra f.n. 104, 106) that the English law on the subject was slightly unsettled. See further Whitley Stokes: I Anglo-Indian Codes XXVI-XXVII For the traditional nature of public documents see Thakur : Hindu law of Evidence (1933 Calcutta) 1201 ff.

139. Ibid at pr.55 p.515.

140. Ibid at pr.57 p.516.

141. (1956) S.C. (H.L.).

142. A.I.R. 1961 S.C. 493 at pr.56 p.516.

143. See A.I.R. 1931 P.C. 274 at 258 col.2.

to protect the public interest at all costs and quotes the flowery language of English judges to sustain his point of view.[144] The difference of approach between the two judges can be seen from the difference of approach that they adopt to, for example, R. M. D. Chambarabaugwala v Y. R. Papria,[145] Public Prosecutor v Venkatta Narsayya,[146] W. S. Irwin v D. J. Reid,[147] Ijat Ali v K. E.,[148] Nazir Ahmad v E. E.,[149] Home v Bentinck,[150] Smith v East India Co.,[151] Beatson v Skeane,[152] Hennessy v Wright,[153] Robinson's case,[154] Asiatic Petroleum Co. Ltd. v Anglo Persian Oil Co.,[155] the "Thetis" case,[156] Ellis v Home Office,[157] the Glasgow Corpn. case,[158] We will also

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144. Ibid at pr.58 p.517 (quoting Pollock C.B. in Beatson v Skeane); at pr.60 p.517 (quoting Best C.J. in Homer v Ashford (1825) 130 E.R. 537); see also pr.64(a) p.519-20.

145. A.I.R. 1950 Bom. 122; Gajendragadkar J. at pr.28 p.506; Kapur J. at pr.77 p.524. Hereafter Kapur and Gajendragadkar JJ will be referred to as K. and G. respectively.

146. A.I.R. 1957 A.P. 486; G. at pr.28 p.506; K. at pr.81 p.525.

147. A.I.R. 1921 Cal. 282; G. at pr.29 p.506; K. at pr.75 p.523.

148. A.I.R. 1943 Cal. 539; G. at pr.29 p.506.

149. A.I.R. 1944 Lah. 434; G. at pr.30 p.506-7; K. at pr.76 p.523.

150. (1820) 129 E.R. 907; G. at pr.6 p.499; K. at pr.57 p.517.

151. (1841) 41 E.R. 550; G. at pr.6 p.499; K. at pr.59 p.517.

152. (1860) 157 E.R. 1415; G. at pr.28 p.506 and pr.8 p.499-500; K at pr.58 p.517.

153. (1888) 21 Q.B.D. 509; G. at pr.39 p.510; K. at pr.75 p.523.

154. G. at 507; K. at pr.77.

155. (1916) 1 K.B. 822; G. at pr.39 p.510; K. at pr.62 p.518.

156. G. at pr.34-5 pp.508-9; K. at pr.68 p.522.

157. (1953) 2 All.E.R. 149; G. at pr.39 p.510; K. at pr.69 p.522. G. uses the case to illustrate a trend, K. merely mentions that there was a note of dissatisfaction.

158. G. at pr.38 p.510; K. at pr.56-7 pp.516-7.

notice that Kapur J. does not cite Spiegelman v Hocker[159] and that Gajendragadkar J. does not cite many English[160] and Indian[161] cases which Kapur J. cites to defend his orthodox position. Equally Kapur J. does not cite some cases relied upon by Gajendragadkar J.[162] We can see from our earlier classification of case law[163] how selective the choice of case law has been.

The third judge, Subba Rao J., quite clearly wanted to maximise the Court's power as much as the statute permitted.[164] He therefore openly criticises the "Thetis" case[165] and reads the Glasgow Corpn. case, Robinson's case, together with a host of Indian cases, to suggest that the powers of the Court are similar in India.[166] His

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159. G. at pr.39 p.510.

160. R v Hardy (1794) 24 St.T 1099 (at pr.64(a)); R v Watson (1817) 2 Stark 116 (at ibid); Homer v Ashford (at pr.60); Wadeer v East India Co. (1856) 4 W.R. 421 (at pr.56); Dickson v Earl of Witten (1859) 175 E.R. 790 (at pr.58); Stace v Griffith (1869) 16 E.R. 633; H.M.S.Bellerophon (1874); Morris v Edwards (1890) 5 A.C. 309; Marks v Beyfus (1890) 25 QBB.D. 494; Hughes v Vargas (1893) 9 T.L.R. 551; Griffin v South Australia (1925) 36 C.L.R. 378 - Note that the last 6 cases are all cited at pr.64(a). Mackintosh v Dun (1908) A.C. 390 (at pr.60); Marconi Wireless case (1913) 16 C.L.R. 178 (at prs. 56 and 65); some of the Scottish cases at prs.63 and 69 and Auten v Rayner (1958) 3 All.E.R. 566 at pr.70.

161. Tilkav State A.I.R. 1957 All. 493 (at pr.83); Jehangir v Secy of State (1904) 6 Bom.L.R. 131 (at pr.75); Re Mantubhai Mehta A.I.R. 1945 Bom. 122 (at pr.77); I.M.Lal v Secy of State A.I.R. 1944 Lah. 209 (at pr.76); Bhaiya Sahib v Ram Nath A.I.R. 1938 Nag. 358 (at pr.54 and 80); Lakhuram v Union A.I.R. 1960 Pat. 192 (at pr.82).

162. e.g. G.G. v Peer Mohd. A.I.R. 1950 E.P. 228 (at prs. 28, 30, 40 - note that Kapur J. wrote a judgement in this case); Kaliappa v K.E. A.I.R. 1937 Mad. 492 (at pr.28).

163. See supra f.n. 104, 106, 116, 117.

164. See A.I.R. 1961 S.C. 493 at pr.94-5 p.527; pr.100 p.529; pr.104 p.531.

165. Proposition 4 at pr.105 pp.531-2.

166. At pr.100.

selection of case law is very confused and one is tempted to query the huddling together of Ijat Ali's case with Nazir Ahmad's case.[167] But the inspiration behind Subba Rao J. is not the belief that official secrecy is incompatible with democracy, but rather the pique that a judge cannot look at what the lowest-in-the-cadre clerk can.[168] But yet we are offered no reason why judges are more suited for deciding matters of public interest.[169]

What is amazing about the attitude of all the judges is that they are all happy to regard the problem before them as a typical English law problem and it almost appears as if they were looking at an English law problem in the abstract.[170] We find no discussion about the problem of Official Secrecy and still less about Indian democracy and the possible repercussions that might ensue if the administration were called upon to be more frank in their disclosures. This may have been the underlying assumption behind both Kapur and Gajendragadkar JJ.'s judgements, but this assumption never comes to the surface. We are forced to admit that, despite the Court's general belief in democracy and freedom, in fact it was unable to assume a consistent theoretical position about the importance of frankness in an administration, received its inspiration almost solely from English legal thinking and was content with accepting one of the varied solutions profferred by English case law.

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167. at prs. 98-9 pp.528-9.

168. at pr.100 p.529.

169. Note the statement of Sir Elwyn Jones in f.n.100 that judges are not suited for deciding such problems.

170. See Gajendragadkar J. at prs. 14-16; Subba Rao J. at pr.100; Kapur J. almost openly admits this at pr.84.

iv. Golak Nath v Punjab - a doctrinaire decision.

In direct contrast to the Court's views on Obscenity, Contempt of Court and Official Secrecy, is its judgement in Golak Nath v Punjab,[171] where the Court held by a 6 : 5 majority that the rights contained in Part III of the Constitution are so fundamental that they cannot be amended by Parliament and a special Constituent Assembly would have to be convened to make alterations in that Part. This decision has raised a great controversy,[172] a very few jurists

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171. A.I.R. 1967 S.C. 1643.

172. A.R.Blackshield: Fundamental rights and the economic viability of the Indian Nation (1968) 10 J.I.L.I. 1-120, 183-240; P.R.Baldota: Amendability of Fundamental Rights (1968) 70 Bom.L.R. Jnl. 84; P.S.Chaudhri: The Golak Nath Case - a critical appraisal A.I.R. 1968 Jnl. 90; Ibid: Amendability of the Constitution A.I.R. 1967 Jnl. 146-9; C.V.Ramanajachari: Some observations on the criticisms of the Supreme Court's judgement in Golak Nath's case (1967) 2 M.L.J. Jnl. 34; S.M.Kumaramanglam: The power of Parliament to amend the Constitution (1967) 1 S.C.J. Jnl. 47; K.L.Gauba: The Supreme Court and Fundamental Rights A.I.R. 1967 Jnl. 84-5; K.V.Kurikose: Constitutional amendment in India (1968) K.L.T. Jnl. 27; C.K.Paphtary: Is right to property fundamental (1970) 1 S.C.W.R. Jnl. 9 (not really directly in point, but a useful statement of attitudes); R.S.Gae: Amendment of Fundamental Rights (1967) 9 J.I.L.I. 475; U.N.Gupta: Constitutional paramountcy of Fundamental Rights (1969) 1 S.C.J. Jnl. 43; V.K.K.Iyer in Law College Magazine Ernakulam as reviewed in A.I.R. 1971 Jnl. 22-3 (critical of the judgement from a political and economic point of view); D.P.Mohanty: The procedure for Constitutional Amendment in the Commonwealth (1968) S.C.D. Jnl. 67; see also ibid (1969) 11 J.I.L.I. 87; V.S.Mani: Constitutional Amendment and Fundamental Rights (1968) S.C.D. Jnl. 8 = Cut.L.T. Jnl. 3; P.B.Mukharji: Critical Problems in the Indian Constitution (1968) 188; M.K.Nambiyar: Amending the Fundamental Rights in the Indian Constitution (1969) Law. 61; G.S.Pande: Parliaments power to abridge Fundamental Rights (1970) 1 S.C.J. Jnl. 53; K.B.Padia: Golak Nath v State of Punjab - an erroneous ruling A.I.R. 1968 Jnl. 138; S.K.Patil : Times of India Dec. 25, 1968 (a politician praising the decision); "V.B.R.": Amendment of the Constitutional provisions relating to Fundamental Rights A.I.R. 1967 Jnl. 146; N.Ram: Can Parliament amend Fundamental Rights (1969) Law. 31; S.V.Ramanna: Judicial review and the Supreme Court of India A.I.R. 1969 Jnl. 122; 130 esp. at 122 col.2 and 130; M.D.Vidwans: A plea for Constitutional Amendment A.I.R. 1968 Jnl. 63. M.Imam: The Indian Supreme Court and the Constitution (1968 Delhi) 321-45; Merrillat: Land and the Constitution (1970 Bombay) Chapter 11; Seervai: (1967) Chapter 30. Note: An exhaustive study of the problem was made by S.P.Sathe: Fundamental Rights and the Amendment of the Indian Constitution (1968 Bombay); Ibida Amendability of of Fundamental Rights (1969) 1 S.C.J. Jnl. 33; Ibid: Supreme Court, Parliament and Constitution (1971) VI Economic and Political Weekly 1821-8, 1873-9.

have welcomed it,[173] while others have argued that it is technically incorrect[174] or that it is a bad policy decision.[175]

The majority of the Court[176] argued that an Act amending the Constitution is a "law" within the meaning of Article 13 and its validity must be determined by the very Fundamental Rights which it purports to amend.[177] At the same time it was asserted that Article 368 which contains the procedure for amendment is merely procedural in nature and that it does not grant a "power to amend", which since it was not contained in the legislative lists must lie not in Parliament but in a hypothetical Constituent Assembly which in turn would be constituted by Parliament under its residuary power.[178] The majority clearly stated that they believed that Fundamental Rights were "sacrosanct" and that there were certain "implied limitations" which they had to infer when considering what would otherwise be a virtually uncontrolled power of amendment.[179] It is clear from the Constituent

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173. e.g. Blackshield (supra f.n. 172); see more recently M.C.G.Kagzi: Unamendability of a Bill of Rights - a norm of Indian Constitutional Jurisprudence (1971) Public Law 205 who makes the wholly absurd suggestion that changes in Fundamental Rights should normally require a Constitutional referendum forgetting that issues tend to get diffused in an election or referendum. Note also the comments of T.K.Tope: in his contribution to M.B.Mujumdar (Ed.) Principal Pandit Law and Legal Education (1972 Poona) 71 as well as the contribution of M.B.Mujumdar at 80 ff.

174. The best example of this is Seervai (supra f.n.172).

175. See on this S.P.Sathe (supra f.n.172).

176. Subba Rao C.J. read the judgement for Shah, Sikri, Shelat and Vaidialingam JJ. Hidayatullah J. read a separate supporting judgement. Note Subba Rao's justification of his judgement in Man and Society (1971) 51-4.

177. A.I.R. 1967 S.C. 1643.

178. Ibid at pr.55 p.1670 (per Subba Rao C.J.); pr.163 p.1705 pr.196 proposition (v); p.1718 (per Hidayatullah J.) contra pr.270 p.1737 (per Ramaswami J.).

179. Ibid at pr.22 p.1657 (per Subba Rao C.J.); pr.163 p.1704-5 (per Hidayatullah J.) contra Wanchoo J. at pr.77 p.1675-6.

Assembly Debates that the Assembly first expressly,[180] and later impliedly,[181] made it clear that there was no restriction on the power to amend Fundamental Rights. Thus this argument is a creation of the majority in the Court.

We have already shown[182] that the curious twist given by the Supreme Court to the doctrine of prospective overruling makes Golak Nath's case really some kind of threat against a possible hypothetical exercise of the power of amendment. The majority in the Court were in the position of being aware that their lecture to Parliament on good constitutional behaviour could not really cause any real damage. Golak Nath's case was virtually a confrontation between the "lawyer judges" of the Court (who formed the majority) and the Civil Service judges, all three of whom led the minority of five and wrote two of the three minority judgements.[183] Wanchoo J. (the leading minority judge) rightly pointed out that the most important consideration that Parliament, if it had a comfortable majority, could do away with Fundamental Rights (and indeed any other important part of the

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180. See IV C.A.D. (for Apr.29,1947) at 397 ff where an Amendment by Santhanam purports to make this clear; although this Amendment was accepted it does not appear to have been incorporated into the Constitution.

181. This is clear from B.R.Ambedkar's speech at VII C.A.D. 43-44 where he stresses that apart from the exclusions in the proviso of Article 368 "All other articles are left to be amended by Parliament." He issues a word of warning and says that any future Constituent Assembly would necessarily be partisan.

182. See Chapter II Section 1 (the discussion on prospective overruling). Note Subba Rao J.'s statement in Man and Society (1971) 84-5 that prospective overruling makes room for social reform.

183. The Civil Service judges are Wanchoo J. who read the main minority judgement on behalf of Bhargava (another Civil Service judge) and Mitter JJ. Ramaswami J. (the third Civil Service judge) and Bachawat JJ. wrote their separate concurring judgements.

Constitution like Parliamentary Government) was really no more than an "argument of fear"[184] and therefore political and doctrinaire in its approach. To support him was the fact that the Court had itself rejected the majority argument on two occasions,[185] albeit in the second instance it was not really directly in point[186] and two judges made obiter observations similar to the ones later used by the majority in Golak Nath.[187]

A large part of the majority judgements in fact consist really of theoretical arguments about the nature of democracy and rights.[188] An excellent example of window dressing and extrajudicial argument is a delightful gem in Hidayatullah J.'s judgement, where he quotes in French a statement on ministerial responsibility in England, only to

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184. A.I.R. 1967 S.C. 1643 at pr.70 pp.1673-4; prs.111-113 pp.1688-9.

185. Shankari Prashad v Union A.I.R. 1951 S.C. 458 (where the argument was rejected for a unanimous Court in a judgement by Shastri C.J.); Sajjan Singh v Rajasthan A.I.R. 1965 S.C. 845. On the latter case see the approving comments of A.R.Blackshield: Fundamental Rights and the Institutional viability of the Indian Supreme Court (1966) 8 J.I.L.I. 139; Contrast Atul M.Setalvad: Amending the Constitution (1966) 68 Bom. L.R. Jnl. 65; and comments on the case by C.V.Ramanujachariar (1966) I M.L.J. Jnl. 21; R.Krishnamurthy (1966) I M.L.J. Jnl. 36. Note also the comments of C.S.Venkatasubramanian: Are Constitutional Amendments affecting Fundamental Rights valid (1966) I M.L.J. Jnl. 31.

186. The point directly at issue was whether the amendments of Fundamental Rights by indirectly affecting the powers of the High Courts of the States under Article 226, could be questioned because the State legislatures had not ratified the Amendment. The Court unanimously held that it did not.

187. The majority judgement was read by Gajendragadkar C.J. (for Wanchoo and Dayal JJ.). Hidayatullah and Mudholkar JJ. wrote separate judgements concurring in the main result but questioning generally whether fundamental rights could themselves be amended.

188. A.I.R. 1967 S.C. 1643 at prs.16-23,pp1656-8; pr.54 p.1670 (per Subba Rao C.J.); pr.126, 129 p.1693; pr.130 p.1694; pr.138 p.1697 ("democracy must not walk in fear of itself"); pr.141-146 pp.1608-1700; pr.142-3 and summary pr.195 (per Hidayatullah J.).

tell us in the footnote that both the original and the translation are taken second hand from a text book.[189] One is forced to accept a critic's argument that political and philosophic discussion have no place in the Court where the matter before it is a simple problem of statutory construction.[190] It has always been recognised that the power of amendment is a constituent power and the only real limitation on it is political and procedural and not to be implied from political theories.[191]

Subba Rao J.'s reference to two Privy Council decisions to show that an Amending Statute is in fact a law simplicieter is of doubtful value. All that those decisions establish is that certain parts of a Constitution can be "uncontrolled" and do not require a special procedure to be followed.[192] They are hardly authority for the proposition that an Amending Act should be treated by the Courts as a "law" for all purposes and tested by the very Part of the Constitution they seek to change. Equally doubtful is the majority's excessive reliance on "marginal notes" in an effort to show that Article 368

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189. Ibid at pr.160 p.1703-4.

190. Seervai (1967) 1108.

191. See R (O'Brien) v Military Governor N.D.U.Internment Camp (1924) 1 I.R. 32; Harris v Minister of the Interior (1952) (2) S.A. 429; Ibid (1952) (4) S.A. 769; Collins v Minister of the Interior (1957) (1) S.A. 552; on the procedural aspect see Henson: Essays in Constitutional Law (1961 Edn) Chap.I; contrast O.Hood Phillips: Constitutional and Administrative Law 51-76; Wade: The Basis of Legal Sovereignty (1955) C.L.J. 172 accepts the political factors. Contrast C.F.Amerasinghe: The Legal Sovereignty of the Ceylon Parliament (1966) Public Law 65.

192. Macawley v R. (1920) A.C. 691 (P.C.); Bribery Commissioners v Ranasinghe (1965) A.C. 172.

193. On the relevance of these cases in this judgement see generally Seervai (1967) 1101 ff.; for a general review of the second case (1965) and the particular problem in the Ceylonese Constitution that it is set in see generally C.F.Amerasinghe (supra f.n.191) 65 ff. But note that the problem is set in a different context there.

relates merely to the procedure and does not describe the power to amend,[194] and the use of sub-headings to emphasis that Fundamental Rights are in fact fundamental - so fundamental that they are sacrosanct, not amenable to amendment.[195] The Court also went out of its way to consult Constituent Assembly Debates to explain their position but taking care to mention that their reference was to illustrate the importance attached to Fundamental Rights.[196] To reinforce their decision they also stressed the Preamble to show that "Sovereignty" vested not in Parliament but in the Constitution.[197]

We can see that what the Court did in fact was use all possible techniques, stretching them to the limit, taking a doctrinaire view about the importance of Fundamental Rights, expressing its horror at the frequent Amendments (which the leading judge Subba Rao C.J. has often done extra-judicially[198]) and, having done all this, state that the impugned Amendments were valid even prospectively. In the end Golak Nath must be regarded as an ill-conceived decision, using dubious techniques, and as more of a political testament or outburst than a jurisprudential decision.[199]

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194. A.I.R. 1967 S.C. 1643 at pr.25 p.1658 col.1 (per Subba Rao C.J.); for a contrary interpretation see prs.77-98 pp.1675-1682 (per Wanchoo J.). Also note the comments of Bachawat J. at prs.205-7 pp.1719-20. On the Supreme Court's usual attitude to the importance of marginal notes see G.P.Singh: Principles of Statutory Interpretation (1966 Allahabad) 87-88.

195. Ibid at pp.1655 ff.(per Subba Rao J.) see further and contrast G.P.Singh (supra f.n.194).

196. This is discussed supra Chapter II Section 2.

197. Ibid at pr.15 p.1655 (per Subba Rao C.J.) Hidayatullah J. also refers to the Preamble in passing at pr.129 p.1693-4.

198. See for example Subba Rao: Frequent tampering with the Constitution undermines freedom (1968) K.L.R. Jnl. 45; Ibid: Man and Society (1971 Bangalore) 51-4 (where Golak Nath's case is discussed).

199. Note that the 25th Amendment purports to avert the imbroglio perpetuated by Golak Nath's case. Articles 13 and 368 have been suitably altered. It has been suggested (by S.P.Sathe: (1971)(supra f.n.172) that the Amendment is valid because Art. 13 merely defines law and does not take away any rights. The Court had however made it clear that Part III cannot be amended even indirectly. In any event, the 25th Amendment can hardly be directly questioned because it does not affect anyone's rights (no one therefore has any locus standi to challenge it) but merely gives Parliament a "power". A litigant can only question later amendments like the 26th Amendment and the question that will arise in that circumstance is whether the 25th Amendment affords any defence.

To sum up, we must accept that despite its notional acceptance of the importance of Civil liberties, in actual fact the Court's attitude to Civil liberties is hardly inspiring. They have tried to follow cosmopolitan learning but no attempt has in fact been made to justify all this in India's context. Thus we must accept that D. H. Lawrence wrote an "obscene book", rather than that it is obscene in the Indian context; we are forced to accept that any criticism that might make a judge appear in a bad light is contempt rather than be told that in the context of Indian society's tendency to think in a status-oriented way judges need more protection than elsewhere; we are led through a plethora of English precedent on Offical Secrecy (even though the latest English ruling which reverses all the earlier ones is conveniently neglected in the later decisions) but no real attempt is made to explain what must be the Court's attitude to Official Secrecy in India. While not totally neglecting unformulated indigenous pressures, the Court has been very mechanical in its approach to the problem on which it was called upon to adjudicate. Golak Nath's case must be considered as an incomplete and unconvincing attempt to make us think otherwise. The Court has increased its powers and generally broadened its role (in for example matters like "Obscenity") but it is unsafe to predict any definite patterns.

2. Secularism, Freedom of Religion and Minority Protection.

i.(a) Secularism and Freedom of Religion.

A lot of analysis has centred upon the nature of Indian secularism.[1] It is impossible for Indian Courts and the Indian Parliament to preserve the American theory of the "wall of separation"[2] between religion and the State, for that would be inconsistent with Indian tradition which assigns to the State a moderating role in matters of social reform and which culminated in the Constitution itself which has sought specifically to accept this role. The relevant provisions are :

> "Article 25. Freedom of conscience and free profession, practice and propagation of religion.
> (1) Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
> (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law -
> (a) regulating or restricting any economic, financial, political

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1. From a lawyers point of view see Derrett: R.L.S.I. (1968) Chapter 13; Galanter: Hinduism, Secularism, and the Indian Judiciary (1971) 21 Philosophy East and West 467. From a general point of view see D.E.Smith: India as a secular State (1963 Princeton); Dr. V.P.Luthera: The concept of a secular state in India (1964 London); G.S.Sharma (ed): Secularism: Its implication for law and life in India (1966 Bombay); V.K.Sinha (ed): Secularism in India (1968 Bombay); Gajendragadkar: Secularism (1972); H.S.Ursekar: Legal Secularism in M.B.Mujumdar (ed) Principal Pandit, Law and Legal Education (1972 Poona) 95 espt. at 96 and 102-3; see also Sharif Al Mujahid: Indian Secularism (1970 Karachi) - a criticism by a Pakistani. For a contrary view by a Muslim see B.Tyabji: The Self in Secularism (1971 Orient Longmans Delhi).

2. For a comparison between the United States and India see Harry Groves: Freedom of religion (1962) 4 J.I.L.I. 191; C.H.Alexandrowicz: The secular state in India and the United States (1960) 2 J.I.L.I. 273; P.K.Tripathi: Secularism: Constitutional provision and judicial review (1966) 8 J.I.L.I. 1. From the purely constitutional point of view see also M.Imam: The Indian Supreme Court and the Constitution (1968) 167 ff.; Seervai (1967) 476-490

3. For the role of the Ancient Indian state in this regard see Kane III H.D. 61-3, 235-41; R.K.Gupta: Political thought in Smriti literature (1970 Allahabad) Chapter V. Also see generally J.W.Spellman: Political theory in Ancient India (1964 Oxford).

or other secular activity which may be associated with religious practice;
(b) provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all casses and sections of Hindus.
...
Article 26. Freedom to manage religious affairs. Subject to public order, morality and health, every religious denomination, or any section therefore shall have the right -
(a) to establish and maintain institutions for charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to acquire and own moveable and immoveable property; and
(d) administer such property in accordance with law."

We will see that the State could either seek to reform religion within the terms of that religion and pretent that there is an inherent "secularism" in Indian religions (a point of view put forward by Hindu and Muslim judges from Allahabad[4]); alternatively it could rely on Article 25(2) and expand "secular" categories at the expense of religious ones. In the first case they would be called upon to decide what a particular religion includes and put a reforming gloss on it and in the second to stress the cause of social reform and juxtapose it as a justifiable exception to freedom of religion.[5] Both pose a problem for the "common law judge". As a foreign observer puts it :

> "But how is a common law judge to do this ? Is he to confine himself to making an assessment solely on the basis of the record before him ? Or may he draw upon his own experience and prepossessions ? ... How about the non-Hindu judge ? Is he to disqualify himself ? ... Once qualified to sit, how is the judge to proceed ? An exponent of a tradition of textual exegesis, the common law judge employs certain techniques of selecting authorities, interpreting and reconciling texts, and introducing innovations. Is is

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4. See the contributions of S.S.Dhavan and M.H.Beg in G.S.Sharma (cited f.n.1).

5. See Tripathi (cited supra f.n.2); Dr. V.P.Luthera (cited f.n.1 supra) 96-7; M.Ghouse: Religious freedom and the Supreme Court of India (1965) 2 Aligarh Law Journal 60-85; Setalvad: Secularism (1967 All India Radio Patel Memorial Lecture, Delhi) 21-29.

> open to him to apply these techniques to the Hindu textual tradition ? Should not the judge enter into that tradition to ascertain its own internal rules and techniquew, its methods of assessing the relative importance of its various elements, and the admissability of innovations ?" 6

Very early in the day the Supreme Court took the view that Article 25 (1) sought to protect what it called in Commr. H. R. E. v L. T. Swamiar "the essential part" of a religion, and made it clear that this essential part was to be derived from the doctrines of the religion itself.[7] The Court's sensitivity to the views of the partisans of the various religions can be gauged from their decision in S. Veerabadran Chettiar v E. N. Ramaswami Naicker,[8] where the Court held that the public destruction of a clay statue of the Lord Ganesa was a crime within the meaning of Section 295 of the Indian Penal Code 1860 (prohibiting the intentional insult of anything religious) even though the statue was not consecrated - a fact made much of by the Court below.[9] Equally important is the case of Saraswathi v Rajgopal[10] where the Court refused to allow a Hindu to make a bequest for the worship of his tomb and where Jaganadhadas J., reading the judgement of the Court, made clear :

> "The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and the needs of modern society." 11

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6. Galanter (supra f.n.1.) 482-3.

7. A.I.R. 1954 S.C. 282. For comments on the change of trend from this position see Tripathi (supra f.n.2); Seervai (supra f.n.2).

8. (1959) S.C.J. 1 discussed in passing by Derrett: R.L.S.I. (1968) 449-50.

9. See A.I.R. 1955 Mad. 550 at 551 col.2.

10. A.I.R. 1953 S.C. 491.

11. Ibid at pr 6 p.495.

Equally important are the early decisions on the control of religious endowments, where the Court admitted the importance of administrative control but at the same time would not allow the State to intrude into the esoteric innermost sanctuaries of a temple for administrative purposes[12] and even for social reform.[13]

But gradually this policy was abandoned. A clear example of the tensions within the Court can be seen in Saifuddin Saheb v Bombay[14] where the Court had to consider whether a State statute prohibiting excommunication in a certain sect violated the right to religion and the freedom to manage religious affairs. Sinha C.J. took the straight line that social reform was important,[15] but this was only partly accepted by the majority which considered, through Das Gupta J., that excommunication was an important part of the right to management,[16] and not connected with social reform.[17] A very realistic note of warning was given by Ayyangar J. in his separate concurring judgement in which he stressed that Article 25 (2) was not intended to reform a religion out of existence.[18] It was obvious, given India's

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12. Commr. H.R.E. v L.T.Swamiar A.I.R. 1954 S.C. 282.

13. Sri Venakataramana Devaru v Mysore A.I.R. 1958 S.C. 1032; discussed Derrett: R.L.S.I. (1968) 468-50; Seervai (1967) 491-2; Tripathi (supra f.n.2) at 18 - the last named critic suggests that T.L.V.Aiyar J. who read the judgement of the Court "no longer confined himself to the 'rites and ceremonies' referred to in the dicta of the Swamiar case, and enhanced the scope of denominational authority far beyond what Mr. Justice Mukherjea is likely to have contemplated." This is based on an extremely textual account of what Mukherjea J. said.

14. A.I.R. 1962 S.C. 853. Note the extremely incisive comments by Derrett: (1963) 10 I.C.L.Q. 693; Ibid: R.L.S.I. (1968) 473-77; Seervai (1967) 484-7; Tripathi (supra f.n.2) at 16-18

15. Ibid at pr.11 p.860; pr.17 p.863 col.2; p.866.

16. Ibid at pr.42 p.869.

17. Ibid at pr.44 p.870.

18. Ibid at pr.63 p.875 col.2. He observed that " ... very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of a 'provision for social welfare and reform'."

context, that Article 25 (2) could not be used for steam roller reform in religious matters and that the basis of reform had to be found in Indian religions themselves. An unconvincing attempt to do this was made by Kapur J. in V. V. Giri v D. Suri Dora[19] where in a dissenting judgement we find the learned judge arguing strongly in favour of inter-hierarchical mobility between castes, ignoring almost completely the limitation placed on this by both the theoretical and practical suppositions underlying Hinduism.

Gajendragadkar J.'s judgement in Yagnapurushdasji v Muldas[20] is equally important. Here the Court was called upon to decide whether the denominational temples of the Narayanaswami sect could be thrown open to the general public. It was denied that the members of the sect were in fact Hindus. In what has been described as a "remarkable judgement"[21] the Court widened the definition of a Hindu beyond recognition relying in the main on western inspired philosophical accounts of Hinduism rather than trying to define the problem in social and

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19. A.I.R. 1959 S.C. 1318 at 1331. This case has been exhaustively discussed by Galanter: The problem of group membership: Some reflections on the judicial view of Indian society (1962) 4 J.I.L.I. 331 where he contrasts the doctrinaire and fictional approach in this case with the empirical commonsense approach of the Courts in Vithaldas Jasani v Moreshwar (1954) S.C.R. 817; Shyamsundar v Shakkar Deo A.I.R. 1960 Mys. 27; Wilson Reade v C:S.Booth A.I.R. 1958 Ass. 128. Note also the comments of Derrett: (article cited infra f.n.20 1968) 70 Z.V.R. 110 at 125-8.

20. A.I.R. 1966 S.C. 1119. Note the comments of Derrett: The definition of a Hindu (1966) 2 S.C.J. Jnl. 67; Ibid: "Hindu": a definition wanted for the purpose of applying a personal law (1968) 70 Z.V.R. 110; M.Galanter: Hinduism, Secularism and the Indian Judiciary (1971) 21 Philosophy East and West 467. Note the Arya Samajists are much more sympathetically treated by Reddy J. in D.A.V. College Hullundur v Punjab A.I.R. 1971 S.C. 1737 at 1743-4.

21. Derrett (supra f.n.20:1968) 70 Z.V.R. 110 at 113. The "secularist" and reformist pressures are much more clearly brought out by Galanter (supra f.n.20).

popular terms.[22] The Court went out of its way to stress the importance of reform in Hinduism itself.[23] This is a totally different approach and reveals that though the Court is much more prepared to take a western educated élitist view of the question of reform, it relies less on an undisguised affirmation of the necessity of social reform (as we saw in the case of B. P. Sinha C.J.) and much more in trying to find theoretical refuge in a modern and predominantly occidental view of traditional notions. This has the advantage of preventing a head-on collision between "traditionalists" and "reformers", both of whom are forced, however unwittingly, to talk the same language.[24] Gajendragadkar J.'s discomfort at being conditioned by the "essential practices" test laid down in the L. T. Swamiar case[25] can be seen in some other judgements delivered by him[26] and has been commented on

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22. A.I.R. 1966 S.C. 1119; note the reference to Monier Williams at pr.27 p.1128; pr.31 p.1128; the Encyclopaedia of Religion and Ethics at pr.28 p.1128; Dr. Radha Krishnan at pr.30 p.1128 pr.32 p.1129; pr.35 p.1130; Max Müller at pr.34 p.1129-30. Thus as Derrett says at (1968) 70 Z.V.R. 110 at 123 "A man who believes in what Dr.S.Radhakrishnan and Max Müller and Monier Willams and B.G.Tilak would recognise as components of Hinduism may well be a Hindu and any temple he and his companions build and use may be a Hindu temple within the meaning of a statute concerning temples."

23. A.I.R. 1966 S.C. 1119 at pr.56 p.1135.

24. This is precisely what Derrett (who can hardly be accused of being partisan) begins to do in (1970) 68 Z.V.R. at 120-124 where he finds textual justification for the broader view of Hinduism and secularism.

25. Commr. H.R.E. v L.T.Swamiar A.I.R. 1954 S.C. 282.

26. e.g. in Durgah Committee v Hussain Ali A.I.R. 1962 S.C. 1402 at pr.33 p.1415 where he denies validity to "practices, though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself." Consider also Tilkayat v Rajasthan A.I.R. 1963 S.C. 1638 at pr.61 p.1661 where he assumes that a right to management must be a purely secular matter. This as we have shown in Chapter II Section 3 (supra) contrasts with Mukherjea J.'s view that proprietary rights in managers of temples and other religious institutions were of a religious nature.

by various jurists.[27]

Azeez Basha v Union[28] demonstrates yet another technique in dealing with problems where religious and cultural rights are involved. Here the Court was asked to prevent the Government for superintending the management of the Aligarh University which has always been regarded as a minority, Muslim University.[29] The Constitution makes no reservation for social reform in Article 30 (1) which reads :

> "All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

The Court therefore relied on on a technicality and insisted that since the Muslim College established in the nineteenth century was formally converted into a university by an Act in 1920, the university was not a minority institution. This decision, which relies on sophisticated legal and presumably reformist notions, rather than social, cultural and historical facts, has been rightly criticised both by a constitutional law jurist as well as a Muslim one.[30]

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27. Note the comments of Tripathi (supra f.n.2) at 19, 25-27; Seervai (1967) 487-489. These judgements were delivered by Gajendragadkar J. on whom see also the comments of Galanger (supra f.n. 20) at 478-9. This view is largely substantiated by the learned judge's book Secularism (1972). Gajendragadkar J. has been recently appointed Chairman of the Law Commission, which in turn is to consider various aspects of the reform of personal laws.

28. A.I.R. 1968 S.C. 662

29. Note the comments of W.C.Smith cited by D.E.Smith (supra f.n.1) 426. These comments are also quoted by M.Ghouse (infra f.n. 30) at 522. See also Sharifal Mujtahid (supra f.n.1) Chapter IX.

30. The following comments are useful: M.Ghouse: A minority University and the Supreme Court (1968) 10 J.I.L.I. 521; Seervai (1967) Supplement for the year 1968 "A-43-7"; contrast the recent cases on the right of Arya Samajis : D.A.V.College, Bhatinda v Punjab A.I.R. 1971 S.C. 1731 at pr.9 p.1734-5; pr.17 p.1737; D.A.V.College Jullundur v Punjab A.I.R. 1971 S.C. 1737 at p.1743-4.

(b) The cow slaughter cases.

The cow slaughter cases create a very difficult problem for the Courts. The Court has to contend with, and ceconcile with the demands of orthodox Hindus who claim that the cow is sacred, Parliamentary statutes which endorse this point of view, the demands of butchers (usually Muslims or low caste Hindus) who claim that their right to follow any trade or vocation guaranteed by Article 19 (1) (g) of the Constitution is infringed by the statutes, the claim made by Muslims that the Koranic texts demand the sacrifice of the cow, and the common sense view (supported by economic data and inserted as a Directive Principle of State Policy[31]) that an agricultural economy can ill afford indiscriminate killing of cows or the indiscriminate preservation of all cows. Mao Tse Tung commenting on a similar problem in China adhered to a common sense (even if fanatic) point of view and observed in one of his earlier "Reports" :

> "Oxen are a treasured possession of the peasants. 'Slaughter an ox in this life and you will be an ox in the next' has become almost a religious tenet; oxen must never be killed. Before the peasants had power, they could appeal only to religious taboo in opposing the slaughter of cattle and had no means of banning it. Since the rise of peasant associations their jurisdiction has extended even to cattle, and they have prohibited the slaughter of cattle in the towns. Of the six butcheries in the county town of Hsiangtan, five are now closed and the remaining one slaughters only enfeebled or disabled animals. The slaughter of cattle is totally prohibited throughout the county of Hengsshan. A peasant whose ox broke a leg consulted the peasant association before he dared to kill it. When the Chamber of Commerce of Chuchow rashly slaughtered a cow, the peasants came into town and demanded an explanation and the chamber besides paying a fine, had to let off firecrackers by way of apology." 32.

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31. Article 48 of the Constitution states: "Organization of agriculture and animal husbandry: The state shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall in particular take steps for improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle." In a recent book J.Dalmia (Ed): A review of beef in Ancient India (1971 Gorakhpur) it is suggested that the Ancient texts sanctioned the killing of cows for particular occasions. On the position in the Constituent Assembly: VII C.A.D. 568-581.

32. Mao Tse Tung: Report on an investigation of the peasant movement in Hunan (March, 1927) reprinted in Selected Works of Mao Tse Tung (1967 Peking) Volume 1, 23 at pp.50-1.

In India the problem takes slightly different proportions because a large part of the economic considerations are in fact concealed by the fact that various other religious and sentimental considerations assume importance. In effect the Supreme Court's conclusion is the same as Mao Tse Tung's (viz. only enfeebled cows should be killed) but it must be considered in greater detail.

The Indian Supreme Court has considered the problem in three cases. The most important of these cases is M. H. Qureshi v Bihar[33] since the other cases merely follow it.[34] The Court appears to have been determined to consider the matter purely from a constitutional and economic point of view in an effort to keep clear of some of the religious subterfuges that were presented to them by Interveners and others.[35] The Court wished to make it seem that religious and social considerations were subsidiary:

> "There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it might be, we, nevertheless think

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33. A.I.R. 1958 S.C. 731. Das C.J. writing the judgement for T.L.V.Aiyar S.K.Das, Gajendragadkar and Bos JJ. Note the comment by Derrett (1959) 8 I.C.L.Q. 221. Contrast the comments of V.K.S.Chaudhary at A.I.R. 1962 Jnl. 25-7.

34. A.H.Qureshi v Bihar A.I.R. 1961 S.C. 448 at 455-6. S.K.Das J. reading the judgement for Imam, Kapur, Sarkar and K.Subba Rao JJ. Note the comments of Derrett: Fundamental Rights in the Indian Constitution: The requirement of reasonableness (1961) 10 I.C.L.Q. 914; Mohd. Faruk v M.P. A.I:R. 1970 S.C. 93 at 95 (following the earlier judgements). Shah J. delivering the judgement for Hidayatullah C.J., Ramaswami, Mitter and Grover JJ.

35. The Court appears to have heard the testimony of Pandit Thakurdas Bhargava, but not allowed the Bharat Go-sevak Samaj, All India Anti-slaughter Movement Committee, Sarvadeshik Arya Pratinidhi Sabha and the M.P. Gorakshan Sangh to intervene in the proceedings. See A.I.R. 1958 S.C. 731 at pr.11 p.738-9.

> it has to be taken into consideration, though only as one of the many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions."[36]

Thus although the Hindu texts are briefly referred to,[37] the Court in fact concentrated on statistical considerations. But Hindu sentiment was not at issue in the Court; what was at issue was whether the slaughter of cows formed part of the Muslim religion. This aspect of the matter is dealt with in an even more perfunctory way. The argument that this might be a religious practice is referred to as a "bald allegation"[38] and after a brief reference to the Koran and Hamilton's translation of the Hedaya,[39] the Court dismisses the argument on the facile argument that the Koran, by giving an option of the slaughter of goat for one person or a cow and camel for seven, did not oblige the Muslims to slaughter a cow.[40] Again the Hindu position (which one must stress was not in issue before the Court) was properly explained by interveners, whereas as regards the Muslim position the Court was content with declaring

> "We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem." 41

It thus appears that in order to establish an 'essential practice,' the petitioners must present inverveners, whom in

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36. Ibid at pr.22 p.745 col.2.

37. Ibid at pr.22 p.744-5. The Court referred to Kane II (ii) H.D.722-3; A.C.Das Rigvedic Culture 203-5 and some of the vedic texts in original.

38. Ibid at pr.13 p.739 col.2.

39. Ibid at pr.13 p.739-40 citing Koran Surah 22 verses 28, 33 and Surah: 107 along with Hamilton's Hedaya Book XLIII (p.592).

40. Ibid at pr.13 p.740 col.1.

41. Ibid at pr.13 p.740.

turn the Court will in all probability now allow to intervene.[42] The Court seems to have abandoned the salutary practice of looking at the religious practices suo motu as it seems to have done in earlier cases.

The Court therefore concentrated not on the religious problem at all but rather on the rights of the butchers under Article 19(1)(g). It had no difficulty in showing that the Directive Principles of State Policy were designed not to protect Hindu sentiment, but to improve livestock.[43] After this the Court considered statistical information from various sources[44] to conclude that a blanket slaughter of cows was unreasonable and that the slaughter of a cow should in fact be directly linked with its age and utility.[45]

Thus the Court seems to have wandered around a typically Indian problem and considered only the secular and economic aspects of the controversy. The result must inevitably please everyone. As a foreign observer puts it :

> "(S)entiment was respected, while Muslim practitioners retained a large part of their trades; but the question remains whether a cosmopolitan (and perhaps a peculiarly American ?) approach to questions of "freedom of religion" applying no traditional standards, will become established - in other words how secular a secular state may be when its inhabitants include practising adherents of various religions." 46

We can see that the Court was aware of the various "Indian" pressures on them, but adroitly evaded a position in which they might

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42. See supra f.n.35 and on inverveners generally Chapter II Section 5 (supra) with Appendix I (infra).

43. A.I.R. 1958 S.C. 731 at pr.6 p.736; pr.12 p.739.

44. Ibid pp.745 col.2 to 753 col.2. A vast amount of information including specialists' reports, even details like the amount of animal manure which cows are responsible for creating.

45. Ibid at 755.

46. Derrett (supra f.n.33) 221 at 224.

be forced to comment on them. It appears that in an effort to be fair the Court is now increasingly relying on secular attitudes; but can the Court use Common law techniques to gauge these attitudes ? Do they have the research facilities ? Further, one must question both the capacity as well as the desirability of the Supreme Court's not considering traditional matters in their own terms. The Court's techniques are legalistic but this overt legalism is really another indication of how India's educated élite react to, and bypass, traditional problems.

We can now turn to an equally delicate matter on which modern occidental thinking and traditional needs conflict.

ii. Equality, Positive Discrimination and the Problem of Backward Classes. [47]

The Constituent Assembly[48] thought it necessary to include provisions in the Constitution which would serve as an exception to the general provisions guaranteeing "equality"[49] so as to enable the

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47. On this topic see generally the unpublished Ph.D theis of G.Luis: Protection of minority interests in the Indian Constitution (1970 London University: Thesis No. 340 at the Institute of Advanced Legal Studies); Galanter: "Protective discrimination" for Backward classes in India (1961) 3 J.I.L.I. 257; Ibid: Equality and preferential treatment: Constitutional limits and judicial control (1965) 14 Indian Year Book of International Affairs 257; N.Radhakrishnan: Reservation to the backward classes (1964) 13 Indian Year Book of International Affairs 293; Ibid: Unit of social, economic and educational backwardness (1965) 7 J.I.L.I. 262; M.Imam: Reservation of seats for backward classes in Public services and educational institutions (1966) 8 J.I.L.I. 441; Ibid: The Indian Supreme Court and the Constitution (1968) 60-9; V.Narayan Nair: Protective Discrimination - The Supreme Court retreats (1969) II S.C.J. Jnl. 34.

48. See the debate at VII C.A.D. 655 ff. on K.T.Shah's amendment that it should be made clear that the provisions were meant for the "advantage, safeguard and betterment" of the backward classes.

49. The general provisions in Articles 14-18 of the Constitution.

Government to go out of its way to help "backward classes" to catch up with the rest of the country. These provisions include :

> "Article 15 (4). Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for Schedule Castes and tribes.
> Article 16 (4). Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward classes of citizens which in the opinion of the State is not adequately pepresented in the services under the state." 50

The question that arises is : What role do these provisions assign to the Supreme Court ?

The Supreme Court has decided a large number of cases both on the meaning of the word "backward"[51] as well as on the lengths to which the Government can go while taking advantage of the provisions permitting "protective discrimination".[52] In its latest judgement in A. Periakaruppan v Tamil Naidu[53] Hegde J. seems to have gone out of his way to examine the scheme of examination used by medical colleges in Madras and even comment on things like whether earmarking 75/275 marks for the interview is excessive.[54]

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50. Note that the reference to Article 29(2) to the Constitution arose because of Das J.'s observations in Madras v Champakam A.I.R. 1951 S.C. 226 at pr.5 p.227 that a protective discrimination could be violative of Article 29(2) which laid down that no restrictions be placed on the entry of students to educational institutions on the grounds only of "religion, race, caste, language or any of them."

51. Madras v Champakam A.I.R. 1951 S.C. 226; Venkataramana v Madras A.I.R. 1951 S.C. 229; Balaji v Mysore A.I.R. 1963 S.C. 649; Chitralekha v Mysore A.I.R. 1964 S.C. 1823; Triloki Nath v J.K. A.I.R. 1967 S.C. 1283; Ibid (the same case was continued at A.I.R. 1969 S.C. 1); A.P. v Sagar A.I.R. 1962 S.C. 1379.

52. Balaji v Mysore (supra f.n.51); Devadasan v Union A.I.R. 1964 S.C. 179; Punjab v Hira Lal A.I.R. 1971 S.C. 1777 (a case brought to the Court prematurely); A.Periakaruppan v Tamil Naidu A.I.R. 1971 S.C. 2303.

53. A.I.R. 1971 S.C. 2303.

54. Ibid at pr.13 p.2306.

(a) "For whom are these provisions intended ?"

Very early in the day the Supreme Court made it clear that it was going to have a say on the nature of these provisions. Thus in Madras v Champakam[55] and Venkataramana v Madras[56] Das J. invalidated an order which made reservations on a community-wise basis, without any reference to backwardness. The Court considered the issue not from the point of the equality provisions[57] but from the point of view of Article 29 (2) and put another bar on the operation of protective discrimination. The Constitution had to be suitable amended by the First Amendment Act 1951 to remove the bar. These early and extremely brief judgements are a constant reminder that the Court planned to treat these exceptions in a fairly limited way because they considered the rights guaranteed in Part III as sufficiently "sacrosanct"[59] not to be affected by considerations of policy, even if these were contained in Directive Principles of State Policy.[60]

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55. A.I.R. 1951 S.C. 226.

56. A.I.R. 1951 S.C. 229.

57. See A.I.R. 1951 S.C. 226 at pr.11 p.228; A.I.R. 1951 S.C. 229 at pr.4 p.230. But note that in the latter case the effect of Article 16 (equality in matters of employment) is considered at pr.4 p.229-30.

58. Supra f.n.50.

59. A.I.R. 1951 S.C. 226 at pr.8 p.228.

60. Ibid. Consider Hegde J.'s extrajudicial comments in his lecture: Directive Principles of State Policy (1971) I S.C.J. Jnl. 50 at 68-9 that this case was a regressive case as an approach to the interpretation of the Directive Principles of State. On the problem of interpretation see also supra Chapter II Section 3 (iii). The relevant Directive Principle in this case is Article 46: Promotion of educational and economic interests of Schedule Castes, Schedule Tribes and other weaker sections - The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Schedule castes and tribes, and shall protect them from social injustice and all forms of exploitation.

The problem of trying to define "backward classes" is very difficult as can be seen from the Report of the Backward Classes Commission (1955) which identified 2,399 backward groups (not including women) one third of which by one estimate[61] constitute 32 per cent of India's population.[62] The criteria adopted by the Commission were occupation, representation in the Administration and social position.[63] The question was what criteria should the Supreme Court adopt (assuming that they should review the criteria at all) and could it adopt the criteria of "religion, race caste, sex, descent, place of birth and residence" which are prohibited by Articles 15 (1) and 16 (2) on the grounds that both Articles 15 (4) and 16 (4) begin with a non-obstante clause.

This matter was first considered by Gajendragadkar J. in Balaji v Mysore.[64] His Lordship was anxious to limit these provisions as much as possible, referred to the Backward Classes Commission in an effort to show that they too though the same way, and suggested the adoption of

> "a rational and scientific approach which is consistent with and true to the noble ideal of a secular welfare democratic set up by the welfare state of this country." 65

His Lordship thought that case was an "artifical growth"[66] struck down the Mysore order because it laid excessive reliance on it,[67] and laid

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61. See Galanter (supra f.n.47 1961) 3 J.I.L.I. 39 at 53 f.n.69.

62. Now see 1961 Census.

63. Backward Classes Commission (1955) Vol.1, 45-7, 107 (for the causes of backwardness). The list of "backward classes" is given in Vol.2.

64. A.I.R. 1963 S.C. 649.

65. Ibid at pr.36 p.664 col.1.

66. Ibid at pr.22 p.659.

67. Ibid at pr.25 p.659-60.

down a very comprehensive, even if eclectic, approach :

> "Social backwardness is in the ultimate analysis, the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward ... (and this) is likely to be aggravated by considerations of case ... (B)ut that only shows the relevance of both caste and poverty in determining the backwardness of citizens.
>
> The occupations of citizens may also contribute to make classes socially backward. There are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons. In a sense, the problem of social backwardness is the problem of Rural India, and in that behalf, classes of citizens occupying a socially backward position in rural areas fall within the purview of Art. 15(4). The problem of determining who are socially backward persons is undoubtedly very complex. Sociological(and)social and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said dat(a) in a rational and scientific way." 68

The "Gajendragadkar catalogue" (if one can call it that) is very pedestrian; it gives us a long list, excludes traditional criteria, but includes them. While establishing a "rational" criteria. The main difficulty in this all too academic approach is that the Government is never precisely told now the Court intends to balance all these criteria apart from the statement that caste cannot be the sole criterion.[69] Further, the responsibility of trying to find the right criteria seems to have shifted from the Government to the Court. The judgement is incompletely worked out and therefore an unhappy compromise between tradition and rationality, between judicial restraint and usurpation of powers of review.

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68. Ibid at pr.23-4 p.659 col.2. Note that at pr.23 p.659 col.1. the judge rejected the use of "caste" generally because it did not apply to "Muslims, Christians or Jains or even Lingayats". It is submitted that the fact that caste groups do not exist everywhere in such groups does not make its existence less relevant for Hindus. Indeed sociologists may conceivably find the existence of identifications analogous to caste in such groups as well. On this see Derrett: R.L.S.I. (1968) 291; L.Dumont: Homo Hierarchus (1970 London) 202-8; and on caste amongst Muslims see Z.Khan: Caste and Muslim Peasantry in India and Pakistan (1968) 48 Man in India 133-148.

69. Ibid at pr.25 p.659.

This approach was reconsidered in Chitralekha v Mysore[70] which brings out all the imperfections of the Balaji ruling, on which the High Court below naturally relied to support their view that a criterion(used by the Government in this case) based solely on economic notions was not justified because it excluded caste altogether. When the matter came before the Supreme Court Subba Rao J. (reading the judgement for Sinha C.J., also party to Balaji's case, Dayal and Ayyangar JJ.) in trying to find a dominant theme in the Gajendragadkar catalogue stressed that "caste" need not be one of the tests at all.[71] The reasons that he gave for this were the fact that Article 15 (4) talked in terms of "classes" not castes (hinting vaguely that caste should be excluded altogether).[72] Mudholkar J. (concurring on this one point) seemed to go one step further and while taking note of the non-obstante clause suggested that none of the factors mentioned in Article 15 (1) and 29 (2) (i.e. "religion, race, caste, sex, place of birth, language, or any of them") should be considered as a valid criterion.[73] Thus gradually the Court, relying on the Gajendragadkar catalogue, seems to be shifting to a solely "secular, scientific and rational" criterion and ignoring the traditional factors which Gajendragadkar J. himself had admitted were relevant. Yet even this change of emphasis seems as loosely phrased as Gajendragadkar's catalogue itself, giving discretion to the Courts to change the balance unpredictably.

70; A.I.R. 1964 S.C. 1823.

71. Ibid at pr.15 p.1833. Note Subba Rao's view in Man and Society (1971) 13, 81-83, that "caste" should become obsolete.

72. Ibid at prs. 19-20 pp.1833-4. At pr.19 p.1834 col.1 it is suggested that caste may only have some relevance. Earlier his Lordship suggested that if the Constitution had intended caste to be a criterion they would have made it explicit.

73. Ibid at pr.43 pp.1842-3. Referring to the non-obstante clause Mudholkar J. says "But that does not justify the inference that castes have any relevance in determining what are socially and educationally backward communities." On caste and backwardness see generally A.C. Paranjpe : Caste, prejudice and the individual (1970 Delhi).

In Triloki Nath v J. K.[74] Subba Rao J. went one step further by suggesting that the Gajendragadkar catalogue considered the economic criterion of poverty more important than any other.[75] The problem in this case was whether a list based on the importance of the adequacy of representation in the services was a valid list ? This was certainly a secular criterion, but it was also, as the Court suspected and made clear later,[76] a basis for a community-wise allocation which the Court had frowned upon in 1951.[77] Subba Rao J. therefore directed that further information be given on the communities involved, suggesting that though this was a valid criterion, it had to be carefully applied in each case. It was natural enough that on receiving this information the Court later ruled that community-wise allocation between Hindus and Muslims in the State of Jamur and Kashmir was not a valid criterion. All this does however go to show that the Court has assumed a very important role in determining the exact meaning of backwardness, even though it has not itself been so exact.

It is with a sense of confusion and shock that one reads Rajendram v Madras[78] where Wanchoo J. reintroduces traditional factors and in particular justifies the importance of caste. Although his observations can be reconciled with the broad criteria of the earlier judgements, the accent is totally different :

> " ... (I)f the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also

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74. A.I.R. 1967 S.C. 1283.

75. Ibid at pr.6 p.1285.

76. See the later developments on this case reported at A.I.R. 1969 S.C.1.

77. This was the view taken in Madras v Champakam A.I.R. 1951 S.C. 226.

78. A.I.R. 1968 S.C. 1012.

> a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Art.15(4) ... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that the caste was the sole consideration and that persons belonging to these castes are not also a class of socially and educationally backward citizens." 79

Virtually the same approach was adopted by Shah J. in A. P. v Sagar,[80] where his Lordship (like Mudholkar J. as we have seen earlier), gave only partial effect to the non-obstante clause[81] but observed :

> "The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and Tribes suffer." 82

At the same time the learned judge thought it necessary to go out of his way to suggest that the observations made by Wanchoo J. in Rajednran's case made

"no departure from the rule enunciated in the earlier cases." 83

What makes this case even more remarkable is the fact that the Court considered it its duty to find out for itself whether the classes were in fact backward, rather than leave this question in the hands of the Government.[84]

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79. Ibid at pr.7 p1014. This entire passage is quoted by Shah J. A.P, v Sagar A.I.R. 1968 S.C. 1379 at pr.6 p.1383.

80. A.I.R. 1968 S.C. 1379.

81. Ibid at pr.6 p.1382. "But clause (4) is an exception to clause (1). Being an exception, it cannot be extended so as in effect to destory the guarantee of clause (1)."

82. Ibid at pr.6 p.1383 col.1.

83. Ibid at pr.6 p.1383 col.2.

84. Ibid at pr.8 p.1384 col.2.

These last two cases have rightly been called "a retreat",[85] for the Court has quite clearly withdrawn from the earlier attempts made by both Gajendragadkar and Subba Rao JJ. (the former no less than the latter) to make the meaning of backward classes as secular and rational as possible. This inconsistency can only be explained on the basis of differing Bench construction in each case. But the demand for further information in Triloki's case, and Shah J.'s assertion that the Court must itself decide these issues, when read along with the Court's earlier statements that the meaning of "backwardness" must be considered on the basis of carefully collected date,[86] make us seriously question the Court's policy of putting itself in a position where it is sole judge of the issue. It is clear that when considering the meaning of Schedule Tribes and Castes the opinion of the Government is conclusive.[87] If this is so it logically follows that the determination of this vexed question should be left to the Government and judicial restraint is called for.[88] The Court must play a moderating role but should intervene only in such cases where the reservation is made for classes which are patently not backward, as in the cases on community-wise allocation, rather than attempt to impose secular criteria and withdraw such criteria each time the personnel on a Bench of judges changes.

(b) "The extent of the reservation".

The Supreme Court has also thought fit to fix limits on the extent to which this power of protective discrimination may be used.

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85. V.Narayan Nair (supra f.n.47).
86. See the statement of Gajendragkar J. cited supra
87. See for example Articles 341-2.
88. This is the suggestion made by George Luis (cited supra f.n 47) 357.

We must at the outset notice that there is no concept of reasonableness (as in Article 19 (2) to (6)) which might suggest that the exercise of the power must be reasonable or within strict limites. But once again the Court assumed the role of educator and even verged on taking a political stand. In Balaji v Mysore[89] Gajednragadkar J. was very perturbed that excessive protective discrimination would lead to a decline in educational standards in the country. Relying on the views of the University Grants Commission[90] his Lordship observed :

> "(R)eservation should and must be adopted to advance the prospects of the weaker sections of society but in providing for such special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities." 91

Strictly speaking, the question whether the first priority should be educating India's most talented people, or whether the country should try to spread out education facilities to the weaker sections, is primarily a question of educational policy and there is nothing in the Constitution which lends support to the idea that this issue is justiciable before the Courts. Gajendragadkar J.'s view that reservation of seats should be of 50 per cent or less depending on the circumstances of the case,[92] seems to suggest that even where the figure is less than 50 per cent it is the Court which must ultimately decide whether this is justified. Clearly such an issue is meant to be an issue to be fought at elections and questioned in State legislature, for it is (theoretically speaking) the representatives of the people who must decide whether public revenues should be spent on their children or on anybody else's.

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89. A.I.R. 1963 S.C. 649

90. Ibid at pr.32 p.662.

91. Ibid at pr.34 p.662-3

92. Ibid at pr.34 p.663.

But the Court managed to find a legal technicality on which to base their would-be reformist conclusions. This is the "doctrine of colourable legislation" which as we have seen earlier,[93] has been relied upon by the Court whenever it cannot find an effective legal ground for intervention.[94] We have already shown that that doctrine should be limited only to such cases where the existence of the power is in question. It cannot be used, it is submitted, as a general residuary technique to question the reasonability or desirability of the exercise of a clearly established power.[95]

Although Gajendragadkar J.'s comments were limited to matters of education, the 50 per cent requirement was relied upon even while considering the "carry forward" rule in administrative matters. Thus in Devadassan v Union[96] Mudholkar J. applied this 50 per cent requirement to prevent the Government from carrying over to the next year reserved seats which had not in fact been utilised in the previous year or years.[97] Although Gajendragadkar J. was not a party to this judgement, he obviously approved of this extension of the 50 per cent rule to a totally different situation by concurring in Wanchoo J.'s judgement in B. N. Tewari v Union.[98]

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93. See supra Chapter III pp.

94. A.I.R. 1963 S.C. 649 at pr.35 p.663. No authority is cited to support the application of the doctrine in this area.

95. See supra Chapter III pp.

96. A.I.R. 1964 S.C. 179 at pr.13 p.186. Note the bland statement on the applicability of Balaji's case at col.2 (of the same page) "What this Court has laid down there would also apply to the present case."

97. Ibid. But note the emphasis on equality at pr.15 p.188.

98. A.I.R. 1965 S.C. 1430 at 1432 Note the fact that Wanchoo J. is in fact a Civil Service judge and is usually mindful of the need to respect administrative convenience. Thus he dissented in General Manager v Rangachari A.I.R. 1962 S.C. 36 where it was held that Art. 16(4) applied also to promotions.

This whole policy was effectively questioned by Subba Rao J. in his dissenting judgement in Devadassan's case. Subba Rao J. rightly stuck to the constitutional problem (perhaps, if one may venture a witticism, for the first time in his career in the Court) and stated F

> "The only question ... is whether in the instant case the State did not provide for the reservation of appointment or posts. (sic) I find it difficult to say that the provision for 'carry forward' is not for the reservation of appointments for the said Castes or Tribes. It is not for this Court to prescribe the mode of reservation." 99

The learned judge took the view that the overall picture must be taken[100] and that there is only cause for complaint if the reservation is disproportionate taking the needs of the community as a whole.

> "Reservation made in one selection or spread over many selections is only a convenient method of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the said Castes and Tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right." 101

One must endorse this approach. We can see how the majority of the Court created an argument on the legal excuse of questioning a colourable exercise of power, found it a colourable exercise of power because the reservations could lower standards of education, but later completely forgot both the context in which the 50 per cent rule was mentioned as well as the doctrine of colourable legislation, the applicability of which was at no stage adequately discussed.

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99. A.I.R. 1964 S.C. 179 at pr.26 p.190.

100. Ibid at pr.27 p.192 where commenting on the "carry forward" rule he makes the commonsense observation: "This provision certainly caused hardship to the individuals who applied for the second and third selection, ... though the non-Scheduled Castes and non-Scheduled Tribes, taken as one unit, were benefited in the earlier selection or selections. This injustice to individuals, which is inherent to any scheme of reservation, cannot in my view make the provision for reservation any-the-less a provision for reservation."

101. Ibid at pr.28 p.192.

To conclude, one can see that while approaching the problem of protective discrimination, the Court has not really been able to get away from its cosmopolitan notions of equality[102] and taken a reformist stand in search for a secular criterion for backwardness. But the task of trying to find a proper secular criterion is in itself a task which the Court is ill equipped to take on. Notions of "equality of opportunity" have once again persuaded the Court to impose severe limitations on Government administrative schemes like the "carry forward" rule. There is, in its only superficially consistent judgements, a lot that smacks of reform and politics. One is forced to make the conclusion that in matters of religion and problems peculiar to an Indian setting the attitude of the Court is more that of intellectual mandarins relying on their fund of reformist ideas and trying to impose these ideas on the Government.

It is respectfully submitted that in a large number of these problems, whether concerned with religion or minority protection, the Court should stick to the problem before them rather than assume the general moderating role. Such matters should be decided with reference to the lives of the Indian people and in the light of governmental problems and not according to abstract, though conceivable well meant, theories of equality and secularism - however progressive these theories may appear to be.

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102. See for example the extra-judicial comments of K.Subba Rao: Man and Society (1971) 81-82.

3. The Supreme Court and Industrial Law - an interesting example of judicial intervention ?

An extended and considered analysis of the Supreme Court's contribution to industrial law is beyond the scope of this thesis and can be traced elsewhere,[1] but at the same time one cannot ignore this contribution altogether. By one estimate[2] the Court had decided 593 reported cases, which is a significant proportion if we remember that its official reports disclose a total of approximately 5,000 cases.[3] Of course not all these cases are directly concerned with industrial law. Some, like Bharat Bank v Employees[4], were concerned with the Court's power to interfere with decisions of labour appellate tribunals. Again the famous case on the Bonus Act of 1965, Jalan Trading Co. v Mill Mazdoor Sabha[5] can quite easily be described (as we shall show later) as a case on delegated legislation. But the cumulative effect of all these cases is that the Courts (and particularly the Supreme Court) exercise a fair amount of supervisory control in industrial matters. So much so that the present Chief Justice of India complained bitterly :

> "No other such Court has to settle the labour disputes of a country. Our Supreme Court deals with dismissal of employees,

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1. The best (even if written for practitioners) is that given by Soonavala: The Supreme Court and Industrial Law (1967 Bombay).

2. Ibid: The list of cases is given at the beginning of the book. Though the figure in the book is 588 note that 5 cases belong to the Federal Court, and there are 10 extra cases inserted in the text.

3. See the details in Chapter I, Section 5.

4. A.I.R. 1950 S.C. 188.

5. A.I.R. 1967 S.C. 691.

> retrenchment, bonus, wage scales, gratuity, tiffin allowance, and a host of other things." 6

This view is endorsed by a former Attorney General who goes one step further to add :

> "Controversies have however, in my view been rightly raised as to the correctness and wisdom of some of the trends underlying this formidable structure of labour jurisprudence. In a number of judgements rendered by the Court, there are phrases like "social welfare', 'social justice' and dynamic development. Does the Code of Jurisprudence evolved by the Court really assist these desirable objective ? Having regard to the circumstances of our country, has not the Court gone woefully astray ? We seem to have adopted ideas and maxims prevailing in certain western countries without consideration of our own existing conditions ... Responsible persons with close knowledge of the needs of industry have expressed the view that the slant given by the jurisprudence of the Court has harmed the country." 7

And this takes us to the crux of the problem. Can the Supreme Court, as a supervisory Court of Appeal, manned by judges trained in Common law methods, really tackle the problems of Industrial policy ? Are they really in a position to question wage increases or decreases, measure the amount of bonus to be paid, work what amounts to a prices and incomes policy, play the umpire and pass an opinion as to whether a particular punishment, promotion, retrenchment or transfer is justified, or question the extent and level of minimum wages ? Assuming that they have both the time and information, can they use this information through the limited interstices within which their Common law methods operate ?

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6. S.M.Sikri: Speech before the Chandigarh Bar - reported at (1971) I S.C.J. Jnl. 72 at 73 col.1. Similar remarks were made in his informal talk at the Institute of Advanced Legal Studies. "Tiffin" allowance means lunch allowance - "tiffin" being the metal box in which an Indian workman (if he is fortunate enough to possess both it and the food to go in it) carries his food to work. A similar complaint was constantly made by one of his predecessors, M.Hidayatullah (see Setalvad: My Life (1971) 603.

7. Setalvad: My Life (1971) 568-9. I have omitted references made in the passage quoted suggesting that the Supreme Court followed an inflationary wage policy. For a non-legal survey see A.S.Mathur: Labour Policy and Industrial Relations in India (1968 Agra).

The development of Industrial law in the Court is associated with Justice Gajendragadkar, who himself regards industrial jurisprudence as a "distinguishing feature of Indian democracy".[8] His readiness to interfere in industrial matters can be contrasted with the trepidity with which English judges approach the problem.[9] If we are really to believe in what Justice Gajendragadkar calls Industrial Democracy, surely it should be clear to the Court that it is up to the Unions to strengthen themselves and bargain with Industry, using whatever persuasive permissable legal tactics are available to them. The Court's intervention is disapproved by management and in the ultimate analysis must unquestionably weaken the viability of the Unions in the long run because they have to sacrifice their own independent tactics in favour of Court intervention.[10]

In fact one can safely argue that in certain matters the policy of the Court has led to the creation of differentials. Thus in J. K. Cotton Spg. & Wvg. Mills Co. v Labour Appellate Tribunal,[11] Gajendragadkar J. held that "gardeners" attached to a mill colony

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8. Gajendragadkar: The Constitution of India (1970 O.U.P.); see also his comments in his forword to Patel: Industrial Disputes Act 1947 (1963 Bombay) viii. Gajendragadkar J. wrote the Report of the Bank Award Commission (1955). His later role in the Supreme Court shows that he was to continue this "arbitral" attitude even as a judge. The best, though extremely uncritical, account of his contribution in this area is by S.Dhyani: Justice Gajendragadkar and labour law (1967) 7 Jai.L.Jnl. 69. On Industrial Jurisprudence in India see also P.B.Mukharji: The new Jurisprudence (1970) Chapter 11.

9. Note the lecture of Lord Donovan (who wrote a general report on Trade Unions (1968) Cmnd. 3623) Trade Union Law, Middle Temple Hall, April 29-30 1969. The lecture has been reproduced. See also the comments of Lord Justice Scrutton quoted in K.W.Wedderburn: The worker and the law (1971 London) 26. See generally the comments of Wedderburn on intervention at pp.17-30.

10. Note Subba Rao J.'s comments in Man and Society (1971) 73-4 that trade unions must be controlled.

11. A.I.R. 1964 S.C. 737

were industrial workers and were entitled to the benefits that other workmen got. But in the recent decision in Madras Gymkhana Club Employees Union v Management[12] the Court held that a large club employing almost 200 employees and having a wage bill of Rs. 2,00,000 was not an "industry". Even though, as has been suggested,[13] this decision may have been Hidayatullah C.J.'s little attempt to limit the Court's activity in industrial matters, the decision could affect fairly seriously the mobility of labour towards certain kinds of jobs.[14] Indeed this dmonstrates that even simple matters of interpretation may ultimately involve carefully considered policy matters.

Consider the recent case on the Bonus Act 1965, Jalan Trading Co. v Mill Mazdoor Sabha,[15] where the Court had to consider whether the Government plans to give statutory effect to the bonus scheme created by the Courts in what has been called the Full Bench Formula.[16] Here the majority of the Court were obviously disturbed by the fact that the Government's formula differed from the Court's formula in as much as it considered entitlement to bonus irrespective of the profit.[17] But instead of invalidating it on that ground, the majority of the Court invalidated it on the ground of "excessive delegation". That

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12. A.I.R. 1968 S.C. 554. Note the analysis of P.G.Drishnan: The meaning of Industry under the Industrial Disputes Act (1970) 12 J.I.L.I. 177.

13. Setalvad: My Life (1971) 603.

14. Since persons working in an "industry" will naturally be in a stronger bargaining position.

15. A.I.R. 1967 S.C. 691. Note the comments of G.S.Sharma: Economic Justice and the Indian Constitution: Some implications of the Bonus Case (1966) 8 J.I.L.I. 457.

16. Ibid at pr.22 p.703-4; pr.55 p.713-4.

17. Ibid at pr.26 p.705 col.2; see also pr.62 p.216-7.

the use of this Constitutional law technique is not free from question can be seen from Hidayatullah J.'s judgement (for Ramaswami J. and himself) that the Court had condoned such a delegation of power in the past.[18] But this case demonstrates how the Court caught up in common-law fears about the delegation of power may confuse "economic policy and objectives" with a technical legalism which may not really be suited to the task that the Court has assigned to itself.

Examples of how the Court has introduced legal notions into industrial matters can be multiplied.[19] In the end we must also remember that the Court is twice (and in some cases thrice) removed from the scene of litigation. Can the Court really undertake to test the veracity of, digest and evaluate the material placed before them with an impartiality which satisfies labour, the businessman and the needs of the economy ?

Once again the Court has moved on the theoretical assumption that it must provide the lead in these matters. Thus we find Wanchoo J. commenting on the need to continue the employment of women who get married,[20] and Gajendragadkar J. commenting on the need to remove socio-economic disparities.[21] The mainspring of the Court's interference is that due attention must be paid to Directive Principles,[22] even though

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18. Ibid at pr.85 p.723.

19. See generally the examples collected by S.N.Dhyani (cited supra f.n.8). Although the account is uncritical, one can see how interventionist the policy of the Supreme Court has been. At one stage (p.70) Dhyani speaks approvingly of how "The Court arranged itself into 'a third Chamber of legislature' for protecting the interests of socially and economically privileged segments of Indian society."

20. Bombay Labour Union v Industrial Franchises A.I.R. 1966 S.C. 942.

21. See supra f.n. 11 at pr. 19 p.743. This is the attitude that Gajendragadkar J. has consistently taken. See generally the comments in the various references cited in f.n.8 (supra).

22. Gajendragadkar : The Constitution of India (supra f.n.8) 51-55 suggesting that "some of the Directive Principles are intended to serve as the foundation of industrial jurisprudence in India."

as we have already seen, the Court has generally followed these principles to suit its own convenience.[23] But these principles have been addressed to the legislatu res and are not justiciable in the Courts.[24] The Court's assumption of the role of paymaster and school teacher, who adjudicates on the amount of pocket money a worker may get and when his "action" can be considered not mischievous enough to be considered legitimate industrial action leaves a lot to be desired. Unlike its attitudes in religious matters, its undisguised protectionism in industrial matters not only freezes the initiative which the various contending groups should try to build up, but intrudes directly into matters of economic policy, which common-law techniques of interpretation are ill equipped to handle.

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23. See generally supra Chapter II, Section 3 (iii) on "Directive Principles of State Policy".

24. Article 37.

4. Conclusion

We can see from our miscellany of cases that in general the Supreme Court has tried to keep abreast of cosmopolitan learning, and even tried to justify its obviously traditional attitudes to issues like "Obscenity" and Contempt of Court in the terms of that learning. But in spite of this instinctive traditional attitude, the Court has in the main tried to be academic, reformist and "secular". "Secular" here must be taken to mean an attitude whereby the Court does not consider traditional aspects of the matter but seeks to place them on what is described as a "rational basis". The Court seems to want to play the part of "social reformer" and moderator on a large number of issues, stretching from the definition of Hinduism to intricate matters of wage determination. It does not seriously question the capacity of tis techniques to cope with these situations. We are still faced with problems of inconsistent voting behaviour (which is the only explanation for the change of emphasis in the meaning of backwardness) and the use of dubious technical doctrines to usher in their point of view. The Court has in some of these areas gone far behond the role of a third Court of Appeal, it has taken on the role of social reform. This approach has varied from time to time and depended disconcertingly on the attitude of the individual judge.

CHAPTER VIII

Conclusions and some comments.

The limitations on effective judicial action.

Before we proceed any further, we must make a preliminary point about the nature of the judicial process. We have already shown[1] that, inter alia, the fear of anonymity has made many lawyers and judges in India think that they can become "leaders" and "social reformers" through their vocation. Irrespective of the possibilites that may be created by their social position (if any) we must at the outset state that the "judicial methods"[2] they have inherited from the common-law tradition impose severe limitations on the extent to which judges (and still less lawyers) can take an active role in intitiating, preserving and furthering the cause of social reform. The lawyer and the judge are really technicians performing a function, whether this consists in disposing of the "trouble case", in "preventive action" or in allocating the emphasis within the power structure.[3] Indeed, one must support the view of an American jurist that in the ultimate analysis even the broad presumptions that often underlie a judgement must in fact emanate eventually from the parties themselves.[4] This is not to

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1. See Chapter I, Sections 1-3 (supra).

2. For an extremely good, even though eclectic analysis of these methods from the point of view of an Indian Supreme Court judge see Hidayatullah: Judicial Methods (1970: B.N.Rau Lectures).

3. The terminology is taken from Karl Llewellyn: The normative, the legal and the law jobs (1940) 49 Yale L.J. 1355. A very realistic account of the real role that lawyers and judges play.

4. L.Fuller: The forms and limits of adjudication reprinted in edited form in Hart & Sacks: Legal Process: Basic Problems in the making and application of law (1958, Cam. Mass.) 421-6; Ibid: Adjudication and the rule of law (1960) 54 Proceedings of the American Society of International Law 1. Note also his comments in The morality of law (1964) 170 ff. but contrast his somewhat wider stand in The anatomy of law (1972 Penguin Books) part 2 generally.

deny that the law has to be defined within a certain background of social consensus and interpreted in that light. A large part of the Cardozo thesis,[5] which would see the lawyer and judge as playing a vital role in the rearrangement of social affairs, must be amended to take note of the limited functions that the legal machinery plays in disposing of the problem case - for ultimately lawyers are concerned with only those problems that a society is unable to resolve otherwise. Equally one must not make too much of the range of social interests that jurists like Roscoe Pound sought to introduce in the law at the turn of the century.[6] But changing the rules (and attitudes to these rules) of interpretation is one thing and re-assessing the role of the lawyer and the judge in the light of the wider possibilities afforded by the new rules quite another.

But yet lawyers and judges in India still seem to nurture the view that they have an important role to play in the rebuilding of the nation. Thus as late as 1965 P. B. Gajendragadkar, then the Chief Justice of India, said :

> "We lawyers and Judges, are often inclined to concentrate all our attention on the work with which we are busy from day to day and are apt to forget the purpose which our work is intended to serve and the motive force on which administration of justice in a democratic country is founded. I often feel that lawyers and judges who take delight and pride in using their tools in the discharge of their professional duties, are like the workmen who helped to build the Taj without ever having appreciated the synthetic beauty of the magnificent structure they were building. The beauty of the law and its

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5. B.Cardozo: The nature of the judicial process (Lectures delivered at Yale in 1921). The utility of these lectures in exposing the factors that go into making the legal process should not be underestimated. For a typical reaction to Cardozo see G.N.Vaidya's (Judge, Bombay High Court) contribution to M.B.Majumdar: Principal Pandit, Law and Legal Education (1972) 3-4.

6. For the survey of interests that Pound thought the law must encompass see III Jurisprudence. See also the discussion by Julius Stone: Social dimensions of law and justice (1964) Chapters 4-6.

> mighty role in the democratic process are not present in our minds as we do our duties from day to day.
>
> Law in a democracy works as a mightly weapon in the achievement of democratic ideal of socio-economic justice ... Democracy is now set on its dynamic ideal of establishing an Egalitarian State, and in the achievement of this ideal law is the great ally and indeed its major weapon." 7

It is impossible to judge the Supreme Court by these standards. We must in the main revert back to legal criteria and pass comment on judges of the Supreme Court on the basis of their legal disciplines and the manner in which they used the techniques available to them to make law in India as India's needs require from time to time, which one must stress is quite a different thing from social reform.

Methods used in decision making.

Some comment on the formal techniques used by the Court is called for. The most important feature of the Court's techniques is the manner in which the Court is able to ignore its earlier decisions or use or apply them arbitrarily or tendentiously or unpredictably. We have seen[8] that their formal, technical attitude to precedent is that it must be respected and not deviated from unless there is a compelling reason to do so. Although the Court has been fairly casual in overruling earlier precedent[9] in actual fact the Court has not relied on the established techniques of

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7. Speech at the Satara Bar. The quotation is taken from the summary report entitled: Philosophy of law (1965) 67 Bom.L.R.Jnl. 33. Note also the comments of K.Subba Rao: Man and Society (1971) 26-27, 54-5, 61-2. Contrast the straightforward approach of S.M.Sikri in his speech at Chandigarh (1971) I S.C.J. Jnl. 72 ff. and especially that of Justice Kondaiah reported (1971) 1 An.W.R. Jnl. 3-12; P.J.Reddy (of the Supreme Court); Some stray thoughts (1970) 11 Guj.L.R. Jnl. 25. See further R.Deb: Law in a Changing Society (1970) 11 Guj.L.R. Jnl. 11.

8. Chapter II Section 1

9. Chapter II Section 2

overruling. Instead the Court indulged in selective referencing and ignored the decisions which they did not want to consider. Judges have often changed their minds and varied the emphasis they have laid on earlier cases. A good example of this is Shah J.'s attitude to Sitabati Devi's case while considering the effect of the concept of reasonableness on laws relating to acquisition.[10] More importantly the judgements of the High Courts are sometimes ignored completely. Thus in the case of the problem of adoption[11] and Hindu Women's rights,[12] we find the Supreme Court passing judgement almost as if there was no controversy before the High Courts. The specific approval of Ankush Narayan's case in Sitabai's case is another instance in point,[13] and had made one foreign critic seriously wonder if the overworked Supreme Court judges read judgements of the High Courts other than those referred to them in afgument.[14] All this has created confusion in the law especially if we remember that even obiter dicta in a Supreme Court judgement are binding on all Courts in India.[15] It hardly ever happens that all the important authorities are discussed while considering a particular problem. It is very difficult to assess whether this is because they were not cited in argument or whether the judges did not themselves consider them, because law reports in India have abandoned the practice of giving summary reports of the arguments and the cases cited before the Court. The fact that the Court is overworked[16]

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10. Chapter III Section 5 (iv).

11. Chapter VI Section 2

12. Chapter VI Section 3

13. Chapter VI Section 2

14. This remark was made by Professor Derrett while commenting on the draft of my Chapter VI before it went to the typist.

15. Chapter II Section 1

16. Chapter II Section 6 and Appendix II

does not entirely explain a failure to look at all the authorities, if we consider the long lectures on political philosophy given in Golak Nath's case[17] and the summary of Marxism given by the Court in Namboodripad's case.[18] Equally judges seem to have the time to undertake to deliver lectures and edit books while still on the Bench.[19] One must assume that lack of time and pressure of work are amongst the factors and that the main source of this apparent lack of "precedent consciousness" (in a system that lives by precedent) can be attributed to the ineptness of counsel and a disquieting lack of interest in the judges of the Supreme Court themselves in trying to evolve a comprehensive and complete picture of the disputed points of law on a particular subject. They do not aim to be "academics" and "academics" they evidently are not.

Even more serious is the fact that because of this lack of "precedent consciousness" we find that the Court often uses legal principles flexibly to achieve particular objectives. Take for example the extended use made of the doctrine of colourable legislation. It was introduced into the law in dubious circumstances in Kameshwar Singh's case[20] and then extended to all kinds of situations like the meaning of "compensation"[21] or the extent to which reservation can be made for backward classes,[22] without further discussion. This is equally true of the use of the doctrine that a chose of action

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17. Chapter VII Section 1 (iv)

18. Chapter VII Section 1(ii)

19. Chapter I Section 4

20. Chapter III Section 4 (ii) b

21. Chapter III Section 5 (i)

22. Chapter VII Section 2 (ii)

cannot be acquired.[23] These are, as we have stressed, examples of "non-neutrality",[24] but they are also examples of what could be dubbed carelessness, but is probably a special style of selectivity, which may ultimately be recognised as India's own.

An even greater measure of uncertainty has been introduced into the Court's attitudes because of the changing Bench structure. We have demonstrated at several places in the thesis that different judges deciding the same point of law as part of differently constituted Benches reach different results.[25] This was particularly true of the judgements of K. Subba Rao J. and we have already seen how Hidayatullah J. has been forced to write a separate judgement to explain that he did not fully support some of the wide observations made by the former.[26] The earlier judgements are not overruled but the accent on the observations made in them is changed slightly.

It is characteristic of India that new ideas are added without old ideas being discarded. A good example of this are decisions on the meaning of "backward classes" where we find different judges emphasising either the traditional or "secular" criteria before them.[27] The result is that law does not evolve in the Supreme Court, it meanders between extremes, as can be seen from the cases on compensation.[28]

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23. Chapter II Section 3

24. Chapter II Section 3 (i)

25. This is demonstrated at several places, principally in Chapters III and IV. Note K.Subba Rao's sanguine remark in Man and Society (1971) 77 "Even so, as more than two judges and sometimes five or more sit in the Supreme Court benches, the personal equation will to a large extent be offset by conflict and compromise."

26. See Chapter III pp.270 Chapter IV pp.380-81

27. Chapter VII Section 2

28. Chapter III Section 5 (i)

This, it is submitted, is India's version of the "happy mean", i.e. a broad margin of tolerance, which is a variety within the common-law pattern and not to be judged by the standards of highly integrated and consolidated commonwealth countries.

In all this the judgement writer plays a very important role. we have demonstrated statistically that in the Supreme Court Chief Justices or prospective Chief Justices dominate the judgement-writing function.[29] It is difficult to assess what really happens between the moment when arguments are closed and when judgement is delivered. An incomplete picture of this was given by Chief Justice Sikri.[30] One judge elects to write the judgement (the seniormost judge having the first option) and draft copies of the judgement are circulated to the judges who constituted the Bench that decided the particular case. These judges may well be, by that time, members of different Benches and writing different judgements on totally different points of law. Indeed Justice Sikri himself admitted to being responsible for fifteen judgements a week - a burden which speaks for itself and excludes the possibility (if this were wanted) of academic balance and completeness. In the context of all this one can legitimately ask - How much attention can the concurring judges pay to the "small print" of a leading judgement ? Indeed, as we have already shown,[31] dissent usually proceeds not because of disagreement with the small print of the leading judgement but rather because of the theoretical attitude of the judge to the particular class of problem before him. This is certainly true of Bose J.'s dissenting judgements in the matter of preventive detention,[32] most of

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29. Chapter I Section 5

30. At his lecture at the Institute of Advanced Legal Studies, June 21 1971.

31. Chapter I Section 5

32. Chapter IV generally.

Subba Rao's dissents and Hegde J.'s dissent in the Dhanwatey cases on the problem of directors' fees and the claims of the joint family.[33] Perhaps the only examples of pure ad hoc dissents can be found in the judgements of Sarkar J. (a much underrated judge) and Kapur J.'s notable dissent in Nanavati's case,[34] which contrasts sharply with his own overtly theoretical and doctrinaire dissenting judgement in V. V. Giri's case.[35]

Returning to our problem, should this tendency be checked and if so how is it to be checked ? The American practice of the whole Court sitting together is hardly feasible partly because of the nature of the arrears that the Court has to clear[36] and partly because the Court changes its personnel at the average of two to three judges a year.[37] In any event the whole Court sitting together will hardly minimise the importance of the leading judgement writer. These arguments also hold good for the reform suggested by a judge of the Court[38] that permanent specialised benches should be established by the Supreme Court to consider certain kinds of cases. We are forced to admit that there is no structural answer to the problem and it is up to the judges themselves to respect earlier judgements and consider the views of earlier judges, in the interest of consistency if nothing

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33. Chapter V Section 2(iii)

34. A.I.R. 1961 S.C. 112 see supra Chapter I pp64 fn 25 Chapter II pp 133

35. Chapter VII Section 2

36. The arrears argument was relied on heavily by Chief Justice Sikri in his speech at the Institute of Advanced Legal Studies June 21 1971. On the magnitude of the problem see supra Chapter II Section 6 and infra Appendix II.

37. Supra Chapter I Section 4.

38. Suggested by M.H.Beg, Judge of the Supreme Court, in a letter to the present writer dated Feb. 14 1972. This was only one of the solutions offered.

else. This does not imply that they should give up their power of overruling an earlier case. The power of overruling, discriminately used, must be recognised in such a way as to leave no room for doubt and no loose ends. The present techniques used by the Court are inconsistent and,to the eye of any student of the common law system, a form of judicial manipulation which sits ill with the rest of the armoury of the Court's techniques.

Whence does the Court get its theoretical nourishment ?

At the beginning of this thesis we asked ourselves the question whether the Court relied mainly on Indian or western ideas for their inspiration and whether they were really another kind of brown Englishman in India.

We have seen that in public law matters a large part of the Court's jurisprudence has in fact come from western sources. Occasionally the Court tries to link modern notions with traditional learning, as in R. M. D. Chamarabaghwalla's case.[39] Lawyers and judges have also tried to do this extrajudicially[40] and we find Subba Rao J. actually suggesting that the Indian Constitution was based on the Bhagwad Gita ![41] Apart from these casual references,in the main the Court seems to rely on cosmopolitan ideas. There are however instances where the judges gauge the "Indianness" of a situation even while adopting a western style. Thus in a recent case[42] we find Hidayatullah C.J. rightly deciding that a politician whose private life has been exposed in a criminal trial, would suffer enough socially and did not merit

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39. Chapter III Section 3 pp. 217-218 especially fn 38.
40. Chapter I Sections 1 - 2 generally
41. Subba Rao: Man and Society (1971) 14-15
42. Laiq Singh v U.P. A.I.R. 1970 S.C. 658.

an unusually high sentence, but took care to mention that his wrong-doings reminded the learned judge of Justine by de Sade.[43]

Thus while considering the law of property the Court seems to have regarded property rights as exclusive rights and seemed willing to protect almost any intrusion on the right to property.[44] They seemed to have overlooked the Indian theory of property[45] which does not regard several claims on a property right as mutually exclusive, but tries to accommodate as many of them as possible, without trying to regard one claim as notionally more important than another. Chief Justice Subba Rao had tried to justify the Court's attitude on the grounds that the poor benefit from it.[46] Even so, the attitude of the Supreme Court has not helped to distribute claims to property in a manner peculiar to the theoretical and practical views of the Indian people. Even more startling is the Court's attitude to preventive detention.[47] Here the Court first mechanically relied on the text of the Constitution, but later treated the power of preventive detention as if it were a simple exercise of administrative power. The result has been that the Court has increased its powers of review and interfered with administrative details at the expense of what were considered to be the settled principles of administrative law.[48] The Court appears to have assumed a theoretical position about the nature of the individual and the State, and then arbitrated mechanically

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43. Ibid at 659.

44. See generally Chapter III

45. Chapter III Section 2

46. Subba Rao: Man and Society (1971) 21-2.

47. See Chapter IV generally.

48. See Chapter IV pp. 352-364.

between the conflicting claims on the basis of cosmopolitan jurisprudence. It is this theoretical assumption that underlies the Court's judgement in Golak Nath's case.[49]

But even this theoretical assumption breaks down when the Court has to protect itself and the rest of the judiciary from criticism,[50] decide onthe meaning of obscenity,[51] or make an intrusion into established concepts of official secrecy.[52] In all these cases the Court seems to have relied on native instincts and needs even though it has tried to preserve its tone of cosmopolitan objectivity. Thus we can see that although traditional factors have operated through an undeclared but clearly idendifiable instinct for traditional matters, in the main the Court has thought of its function as not lagging behind the principles of cosmopolitan jurisprudence.

One would have expected that in personal law matters the Court would have taken a different point of view. But more often than not the Court has merely operated within the confines of principles emerging from decisions established by the Privy Council. The rare exceptions tend to prove the rule. This is certainly true of their attitude to the joint family and particularly to directors' fees.[53] Again there is the example of the attitude of the Court to Pious Obligation (P.O.) and the antecedency rule. The Court seems to have ignored completely the true nature of the pious obligation, and became caught in the Maze of principles established in the Privy Council's judgement in Brij Narain's case, relying feebly on the limited solutions

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49. Chapter VII Section 1 (iv)

50. Chapter VII Section 1 (ii)

51. Chapter VII Section 1 (i)

52 Chapter VII Section 1 (iii)

53 Chapter V Section 2 (iii)

offered by Anglo-Hindu law.[54] The test of a good Supreme Court judgement seems to have become - was the Court ready if necessary to overrule the Privy Council ? Sometimes this has been justified, as in the case of Srinivas v Narayan on adoption[55] or the overruling of Gokal Chand's case in Raj Kumar's case.[56] This might seem to have become something of a fashion, as can be seen in Ramaswami J.'s attempt to dispute the Privy Council's famous judgement in Tagore v Tagore, in Raman Nadar's case,[57] but it was safe to do this because the learning was displayed obiter This has been rightly treated by a foreign observer[58] as a want of legal history in the Court.

Native instinct has played a part as can be seen in judgements like Goli Eswariah's case and M. K. Streman[59]'s case when the Court preserved tradition even in the face of a revenue situation. Again, one of the most remarkable judgements in Hindu law is Guramma v Hallappa[60] where the Court seems to have impliedly (and obviously inadvertently) sanctioned the practice of giving dowries, but at the same time managed to creatively up-date traditional notions to suit changed circumstances. The same judge's (Subba Rao J.) judgement in Raghavamma v Chenchamma (on communicating the intention to sever) is equally remarkable.[61]

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54. Chapter VI Section 1

55. Chapter VI Section 2

56. Chapter V Section 2 (iii)

57. A.I.R. 1970 S.C.1759

58. Derrett: The want of legal history in the Supreme Court (1971) M.L.J. Jnl. 39-45

59. Chapter V Section 3 (ii) pp 449-450

60. Chapter VI Section 3

61. Chapter V Section 3 (iii)

But the latter judgement seems to ignore traditional attitudes almost completely, while the former suffers from not having considered all the various aspects involved in the problem before the Court - which is something we have learned to fear from judgements of the Court.

Judges as Reformers, Leaders and Philosopher-Kings.

Some mention must be made of the inelegant sense of reform that seems to find growing credence with the judges of the Court. The Court seems to have been committed to the view that a large part of traditional living patters are irrational and therefore not "secular". "Secularism" seems to have acquired a transcendental quality which can only be identified with western ideas of rationalism. This is to be seen only too clearly in the Court's decisions on the definition of property,[62] its view of religion and religious practices[63] and its ideas on protective discrimination.[64] A typical statement of the kind of attitude adopted can be seen from an extrajudicial comment made by ex-Chief Justice Gajendragadkar :

> "Secular matters and civil problems have to be dealt with according to reason and according to the basic values of a democracy. In the discussion and decision of these matters, religion is entirely irrelevant. The problems which Indian democracy has to face are many and complex, but Indian democracy is determined not to allow any religious considerations to trespass into the discussion of these problems." 65

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62. Chapter III Section 3

63. Chapter VII Section 2

64. Chapter VII Section 2

65. P.B.Gajendragadkar: The Constitution of India (1970) 41. Contrast Subba Rao: Man and Society (1971) 15 : "The political attempt to implant the quixotic tree of perverted doctrine of secularism of foreign extraction in the religious soil of India has not only failed but in the process has by weakening religion deflated the Indian character."

Subba Rao J.'s dissent in Devadassan's case shows that the Court has often assumed a reformist stand even though the Constitution did not give them the power to introduce such notions into the problem before them.[66] And this takes us to the crux of the problem - can, and should, the judges regard themselves as leaders in matters of social reform ?

This is particularly important if we consider emerging problems like the reform of Muslim law. Judges like V. K. Krishna Iyer (of the Kerala High Court) have taken the view that it is up to the judiciary to reform the law.[67] This is even supported by Justice Beg, a Muslim judge who has been appointed to the Supreme Court recently.[68] The question that arises is whether the Courts or the people and legislature must reform the law. One cannot help agreeing with a foreign observer that the reform must proceed from the people and not from notions of reform entertained by the judiciary.[69] This particular problem is assuming importance as can be demonstrated by the fact that two important conferences have been held on the subject.[70] But what concerns

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66. Chapter VII Section 2

67. See his judgement in Shahulameedan v Subaida (1970) K.L.T. 4 (on polygamy. Contrast the judgement of Dhavan J. in Itwari v Asghari A.I.R. 1960 All 684 where the learned judge also does not approve of polygamy but tries to support his conclusion on the basis of the Koranic texts.). See also his judgement in Khader v Kunhamina (1970) K.L.T. 237. (a case on the doctrine of mushaa).

68. In a personal letter to me Jan.6 1972. He discussed the converse situation of a Muslim judge trying to reform Hindu law.

69. Derrett: A Hindu Judge's animadversions against Muslim polygamy (1970) 72 Bom.L.R. Jnl. 61-3.Note generally Derrett's views on the codification of Muslim law in R.L.S.I. (1968) Chapter 15.

70. See Proceedings of the Twenty-Sixth International Congress of Orientalists (1966) Vol.1. More recently the Indian Law Institute sponsored a conference at Delhi in Dec.-Jan.1971-72. I am grateful to Professor J.N.D.Anderson for having given me an account of the proceedings and letting me have a look at his summary paper : The Muslim law in India written on his return to England.

us is not the political desirability of Muslim reform coming from the Muslims themselves but the wider question as to whether the Supreme Court can assume the role of the philosopher guardian.

The Court is hardly in a position to assume this role. Firstly, the Court lacks the information to deal with complicated issues of social reform. At the same time the Court lacks both the time and the research facilities[71] to enter into the deep problems involved. Secondly, the common law techniques which the Court uses[72] make it necessary for the judge to operate within clearly defined margins. While it is true that the Court can consider a wide range of factors while considering the meaning of "reasonableness"[73] it can be shown that in a large number of cases the Court has relied on legal criteria. Thus its theory of permissible classification in Article 14 is based largely on the principles of delegated legislation.[74] Moreover the Court seems to have attempted social reform even in areas where there were no flexible concepts like reasonableness to grapple with.[75]

Apart from these technical limitations we must question the view put forward by ex-Chief Justice Hidayatullah[76] and

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71. The Court has now got a research officer, M.Imam, who wrote a book called The Indian SupremeCourt and the Constitution (1968).

72. These are surveyed in Chapter II.

73. This is used primarily in Article 19(2)-6. This area is being researched upon by T.K.K.Iyer for a Ph.D. dissertation for the London University. Note that Interveners (supra Chapter II Section 5) can play an important role in widening the issues before the Court. Judges seem to prefer to take a comparitive view of "reasonableness". See K. Subba Rao: Man and Society (1971) 49-50.

74. This is discussed in part in Chapter IV Section

75. e.g. "backward classes" in Chapter VII Section 2.

76. In Democracy and the judicial process in India (1968) 61. One must in all fairness state that the learned judge has in the main taken a limited attitude on the extent of judicial interference. See further at pp.66-67.

others[77] that judges are, by virtue of their discipline, in a better position to comment on public affairs than others. This position can only be supported to the limited extent that judges can be identified with some kind of impartiality. But that is merely a point related to form and credibility and does not necessarily mean that judges are the most qualified persons to take a leadership role in such matters. In fact the more they interfere in non-judicial matters, even by lending their services to the Government as members of Commissions, the more questionable their partiality will become as a social factor.[78]

One must agree with Professor Derrett's view that lawyers (as such) cannot really be leaders as they do not really belong to the decision-making structure and any attempt that they might make to assume a leadership role must either be very limited or be considered as an extra-legal activity.[79] Indeed lawyers like N. C. Chatterjee,

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77. e.g. Dr. K.N.Katju (himself an eminent lawyer and politician): The Indian legal profession A.I.R. 1965 Jnl. 37. See further C.R.Pattabhi Raman: Courts and the law (1970) II S.C.J. Jnl. 11; B.Jaganadha Das (a judge of the Supreme Court): Responsibilities of lawyers in Independent India A.I.R. 1952 Jnl. 59; P.B.Gajendragadkar: Law, Lawyers and Judges (1963) II S.C.J. Jnl. 14; D.C.Srivastava: Legal change and the function of the judiciary (1963) 65 Bom.L.R. Jnl. 81. On the judiciary generally see the Letter of Prof.N.B.Rakshit Sept.14 1971 Amrit Bazar Patrika p.6 and the reply of S.B.Sen on Sept. 28 1971 p.6.

78. On this see the comments in Chapter I Section 4. See the recommendations in the 14th Report on Judicial Administration (1958) Vol.1, 56 (Recommendation 11). Note that similar comments havebeen made by G.Zellick in a note on extra-judicial activities of judges in (1972) Public law 1-10. Since the Supreme Court has punished a slightly differently worded article as contempt (see Hira Lal Dixit's case discussed supra Chapter VII Section 2) one must make it clear that we are only commenting on the effect such appointments has on the minds of the general public.

79. Derrett: Lawyers as leaders as part of the Seminar on Leadership in South Asia organised by the Centre of South Asian Studies, Thursday June 8 1972. I am grateful to both Professor Derrett and Mrl Iyer for discussing their views on the subject with me.

Mohan Kumaramanglam, Dr. K. N. Katju, must, as far as any leadership role that they might assume is concerned, be considered primarily as politicians and not lawyers. To get an idea of the limited role that a lawyer is destined to play we have only to turn to a former Attorney General's recent autobiography.[80]

The only explanation that one can give for the Supreme Court's adopting a leadership role in areas of social reform and labour law[81] can be on the lines suggested at the beginning of this thesis - both the lawyer and the judge found themselves in an unkind social limbo after Independence, and have used their Constitutional position to try to add to their otherwise technical functions an overt social and political importance. First, there was, and is, a vacuum into which any identifiable corps can move, or be forced to move; secondly, the tradition of the pre-Independence judiciary in India as an arm of Power of the "Sarkar" enhances the self-importance and self-expectation of every senior judicial officer in a way unknown in other parts of the commonwealth or in the United States. The status-oriented thinking habits of the Indian people have made Indians willing audiences to pontifications from above and as a result the Supreme Court's would-be prestige as Philosopher-Kings seems to be increasing. This has naturally resulted in the Supreme Court being caught in a controversy with the Government, who must inevitably see this as an attempt by the judiciary

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80; M.C.Setalvad: My life (1971). A salient feature of the autobiography is the fact that there are many places where the Attorney General is involved in quasi political situations but, in the main, his achievements and problems centre upon legal personalities, legal reform, Court judgements and legal situations.

81. Chapter VII Section 3. The discussion is extremely brief. Note that the 14th Report on Judicial Administration had made the following recommendation: "The file ofthe Supreme Court is being clogged with appeals on labour matters and relief should be given to that Court by enabling parties to file appeals in these matters either to the High Court or to a special tribunal constituted for that purpose." (see Vol.I pp.56-57).

to appeal over its head to the people of India directly. The resignation of K. Subba Rao from the Chief Justiceship of the Court to contest the Presidential election adds support to this view. It is by no means suggested that the Supreme Court has been political. The Court is not controversial. It has merely unwittingly figured in an inevitable controversy.

We must mention, in conclusion, that the Supreme Court has in the past been manned by judges chosen mainly from middle class backgrounds. A large number were educated in England. Nevertheless, under pressure from a state of affairs unknown in England and not catered for by English law teachers, their treatment of precedent has been incomplete. This is partly due to a fragmented Bench structure and partly because in actual practice the Supreme Court has not laid much emphasis on consistency. The Court is overworked and the leading judgement writers play an excessive role. The business of the Court is dominated by the Chief Justice or prospective Chief Justice, who since they are selected on a seniority basis know well in advance that, God willing, they are going to lead the Court.[82] Instinct natural to Indians has played a part in reaching decisions, which we can hardly exaggerate; but the Court seems to have approached very many issues before them from the alien standards of western jurisprudence. This is true even in personal law matters where they have hardly (except in a few cases) taken the discussion beyond the frame of reference established by Privy Council. In view of the sources on which they rely the Court's attempts to reform must be regarded as inspired primarily by western ideas, not unsupported by notions about Indian

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82. See supra Chapter I Section 4, and note that the 14th Report of the Law Commission had made the following recommendation (at Vol. 1 p.56): "The practice of appointing the senior most puisne judge of the Supreme Court as Chief Justice of India is not desirable. Instead, the most suitable person whether from the Court, the Bar or from the High Courts should be chosen." Note that the Law Commission did not recommend either political appointments or the appointments of academics.

ways of living, India's needs and their own position (in Indian society) which a sociologist and an objective researcher into Indian politics might well question.

In the end we must regard the attitude of the Supreme Court judges as typical of the decision-making habits of middle-class metropolitan Indians: technically unpredictable, not uninfluenced by imitative cosmopolitan habits, conditioned by native instinct to a depth not yet predictable by the psychologist or documented even by the novelist, and suffering from an over-sensitive opinion of their lonely and unparalleled position.

APPENDICES

I List of cases where an intervener has participated before the Supreme Court of India 1950-70.

II Tables showing the institution and disposal of cases before the Supreme Court of India 1960 to January 1972.

Appendix I : List of cases where an intervener has participated before the Supreme Court of India.

Source : A.I.R. 1950-70 Supreme Court.

Abbreviations : I = Intervener; intervention by the Government of India is denoted by "Union" and those by the States either by the name of the State or by reference to the Advocate General of the State.

1. Ramkirshna Ranath v Kamptee Municipality A.I.R. 1950 S.C. 11 I = Union.
2. Gopalan v Madras A.I.R. 1950 S.C. 27; I = Union.
3. Rashid Ahmad v Municipal Board A.I.R. 1950 S.C. 163; I = Union, State of U. P.
4. Bharat Bank v Employees A.I.R. 1950 S.C. 188; I = Union.
5. Tripura v East Bengal A.I.R. 1951 S.C. 23; I = Union.
6. Janardhan v Hyderabad A.I.R. 1951 S.C. 217; I = Att. Gen.
7. Santosh Kumar v State A.I.R. 1951 S.C. 23; I = Union.
8. U. C. Bank v Workmen A.I.R. 1951 S.C. 202; I = Union.
9. S. Krishnan v Madras A.I.R. 1951 S.C. 301; I = Union.
10. Re Delhi Laws Act A.I.R. 1951 S.C. 332; I = Union; States of Bombay, Madras, U. P. Capt. Deep Chand, Pdt., A. N. Bharadwaj, Ajmer Electric Supply Co;, Maidens Hotel Co., Munshi Lal and 2 others.
11. Shankari Prashad v Union A.I.R. 1951 S.C. 481; I = States of Bihar, M. P., U. P.
12. Bhim Sen v Punjab A.I.R. 1951 S.C. 481; I = Union.
13. Joylal v State A.I.R. 1951 S.C. 484; I = Union.
14. Bhagat Singh v State A.I.R. 1952 S.C. 64; Counsel instructed by agent for a caveator.
15. N. P. Ponnuswami v Ret. Off. Namakkal A.I.R. 1952 S.C. 64; I = Union, State of W. B.
16. W. B. v Anwar Ali A.I.R. 1952 S.C. 75; I = States of Hyderabad, Mysore, and Mr. Habib Mohammed.
17. Madras v V. G. Row A.I.R. 1952 S.C. 196; I = Union, State of T. C.
18. Lachmandas v Bombay A.I.R. 1952 S.C. 235; I = Habeeb Mohammed.
19. Shamrao v D. M. Thana A.I.R. 1952 S.C. 324; I = State of Hyderabad.
20. Ujagir Singh v Punjab A.I.R. 1952 S.C. 350; I = Union
21. Palvinder Kaur v Punjab A.I.R. 1952 S.C. 354; reference to caveator.
22. T. C. v Bombay Co. Ltd. A.I.R. 1952 S.C. 367; I = Union, States of Bombay, Madras, Hyderabad, Mysore, U. P., Orissa.
23. Ashwini Kumar v Arabinda Bose A.I.R. 1952 S.C. 369; I = Law Society, Secy Bar Association Calcutta, Secy Advocates Association Calcutta, Secy Bar Association Bombay, Calcutta High Court, M. C. Setalvad.
24. Punjab v Ajaib Singh A.I.R. 1953 S.C. 10; Amicus curiae for respondent.
25. Vishwamitra Press v Workmen A.I.R. 1953 S.C. 41; I = State of U. P.
26. Venkateswarloo v Suptd. Central Jail A.I.R. 1953 S.C. 49; I = Union.
27. Sisir Kumar v W. B. A.I.R. 1953 S.C. 63; I = Union.
28. Ashwini Kumar v Arabinda Bose A.I.R. 1953 S.C. 75; I = Att. Gen.
29. Darshan Singh v Punjab A.I.R. 1953 S.C. 94; I = State of U. P.
30. Election Commr. v Venkata Rao A.I.R. 1953 S.C. 210; I = Union. Note that the Att. Gen. M. C. Setalvad appeared for both the appellant and the intervener.
31. Bombay v United Motors Ltd. A.I.R. 1953 S.C. 252; I = Union, States of Bihar, Madras, W. B., U. P., Punjab, T. C.
32. Poppatial Shah v Madras A.I.R. 1953 S.C. 274; I = Union, States of Bihar, Punjab, Mysore and U. P.

33. Maqbool Hussain v Bombay A.I.R. 1953 S.C. 325; States of Bombay and Punjab. Note that this is not stricly speaking a case of interveners but multiple appeals from two different states which has the same effect.
34. T. C. v S. V. C. Factory A.I.R. 1953 S.C. 332; I = Union, States of Hyderabad, Mysore, U. P., Punjab.
35. N. S. Thread and Co. v James Chadwick and Bros. A.I.R. 1953 S.C. 357; I = Registrar of trade.
36. W. B. v Bela Banerji A.I.R. 1954 S.C. 170; I = Union.
37. W. B. v Sirajuddin A.I.R. 1954 S.C. 193; I = Union.
38. R. E. S. Corpn. v Andhra Pradesh A.I.R. 1954 S.C. 251; I = Madras.
39. Commrs. H. R. E. v L. T. Swamiar A.I.R. 1954 S.C. 282; I = State of T. C.
40. Rajasthan v Nath Mal A.I.R. 1954 S.C. 307; I = Union.
41. V. M. Syed Mohd. & Co. v Andhra Pradesh A.I.R. 1954 S.C. 314; I = States of Madras, Bihar, Mysore, T. C.
42. Dhirendra v Supdt. A.I.R. 1954 S.C. 424; I = Union.
43. Virendra v U. P. A.I.R. 1954 S.C. 447; I = Union.
44. M. P. v Mandawar A.I.R. 1954 S.C. 493; I = Union.
45. Madras v C. G. Menon A.I.R. 1954 S.C. 417; I = Union.
46. Gajanand v U. P. A.I.R. 1954 S.C. 695; I = reference is made to a caveator.
47. Hiralal Dixit v U. P. A.I.R. 1954 S.C. 743; I = Att. Gen.
48. R. M. Seshadiri v D. M. Tanjore A.I.R. 1954 S.C. 747; I = Union.
49. Central Bank of India Ltd. v Ram Narain A.I.R. 1955 S.C. 36; I = State of Punjab.
50. Muir Mills Ltd. v Suti Mills Mazdoor Union A.I.R. 1955 S.C. 170; I = State of U. P.
51. Automobile Products of India v Rukmaji Bala A.I.R. 1955 S.C. 258; I = Union.
52. Bengal Immunity Co. v Bihar A.I.R. 1955 S.C. 661; I = States of W. B., Madras, Mysore, M. P., Rajasthan, Punjab, Orissa, U. P., Tata Iron & Steel Co., Mr. M. K. Kuriakose.
53. R. N. Sons Ltd. v Asst. Sales Tax Commr. A.I.R. 1955 S.C. 765; I = Berar Oil Industries and others
54. V. O. Vakkan v Madras A.I.R. 1956 S.C. 76; I = State of U. P.
55. In the matter of "D" A.I.R. 1956 S.C. 102; I = M. C. Setalvad to assist the Court.
56. P. L. Lakhanpal v J. K. A.I.R. 1956 S.C. 197; I = Union.
57. Clerks of C. T. Co. v C. T. Co. A.I.R. 1957 S.C. 78; I = State of W. B.
58. L. D. Sugar Mills v Pdt. Ram Sarup A.I.R. 1957 S.C. 82; I = Att. Gen. (but represented by other counsel).
Note also the case of P. S. Mills v Mazdoor Union A.I.R. 1957 S.C. 95, Amicus curiae for the respondent.
59. Re "M" - an advocate A.I.R. 1958 S.C. 149; I = Messrs. M. C. Setalvad and B. M. Sen to assist the Court.
Note : Hanuman Jute Mills v Amin Das A.I.R. 1957 S.C. 194 where there was an amicus curiae for the respondent.
60. Rajinder Chand v Mst. Sukhi A.I.R. 1957 S.C. 286; I = State of Punjab.
61. N. T. F. Mills Ltd. v IInd Punjab Tribunal A.I.R. 1957 S.C. 329; I = Att. Gen., Hukam Chand and others, Atlas Industries.
62. Garikapati v Subbiah Choudhry A.I.R. 1957 S.C. 540; I = Att. Gen to assist the Court.
63. Amar Singh v Custodian Evacuee Property A.I.R. 1957 S.C. 599; I = Murat Singh.

64. K. P. Khetan v Union A.I.R. 1957 S.C. 676; I = R. B. K. N. Khetan.
65. Bombay v R. M. D. C. Chamarabaghwalla A.I.R. 1957 S.C. 699; I = State of Mysore.
66. Hanumantha Rao v A. P. A.I.R. 1957 S.C. 927; I = Union.
67. I. T. Commr. v Smt. J. Chowdhurani A.I.R. 1958 S.C. 19; I = Adv. Gen. Assam.
68. P. L. Dhingra v Union A.I.R. 1958 S.C. 36; I = R. L. Khuller.
69. Sathappa Chettiar v Ramanathan Chettiar A.I.R. 1958 S.C. 245; I = Adv. Gen. for Madras.
70. Sundaramier v A. P. A.I.R. 1958 S.C. 468; I = Union, States of Madras, Bihar, U. P., Mysore Bpg. and Wvg. Co., Minerva Mills Ltd., Tata Iron and Steel Co. Ltd., Madurai Mills Ltd.
71. Kasturi & Sons Ltd. v Salivateswaran A.I.R. 1958 S.C. 507; I = Indian Federation of Working Journalists; Att. Gen. (represented by the Sol. Gen.) to assist the Court.
72. Madras v G. Dunkerly & Co. A.I.R. 1958 S.C. 560; I = States of Bihar, Punjab, Mysore, Kerala, A. P., M/S Uttam Duggal & Co., United Eng. Co.
73. Mithan Lal v Delhi A.I.R. 1958 S.C. 682; I = States of Madras, Mysore, U. P., Kerala, M/S Raipur Provincial Eng. Co.
74. K. Kamraja Nadar v Kunju Thevar A.I.R. 1958 S.C. 687; I = Y. B. Chavan, M. R. Masani, K. P. Pawar, Ibrahim Andari.
75. Mallappa Bassappa v Basavaraj Ayappa A.I.R. 1958 S.C. 698; I = J. L. Nehru, Masuriya Din.
76. Qureshi v Bihar A.I.R. 1958 S.C. 731; I = A Hindu Pandit and several States with connected appeals.
77. Banarsidas v M. P. A.I.R. 1958 S.C. 909; I = States of Bombay, M. P., Punjab.
78. Re Kerala Education Bill A.I.R. 1958 S.C. 956; I = The President, States of Kerala, Kerala Christian Action Committee, Kerala School Managers Assn., Kerala School Mgrs. Badogara and Quilandy; Catholic Union of India, Catholic Assn. of Bombay, All India Anglo Indian Assn., Apostolic Ad. Soc. and R. Diocese, All India Jamiat-utt-ulema-i Hind, Kerala State Muslim League, Kerala Secondary Schools Off. Staff Assn., Kerala Pvt. Teachers Federation.
79. S. T. O. v Kanhaiya Lal A.I.R. 1959 S.C. 135; I = Union, Agra Bullion Exchange and 2 others.
80. Basheshwar Nath v C. I. T. A.I.R. 1959 S.C. 149; I = M/S Model Knitting Ind. Ltd.
81 Arunchala Nadar v Madras A.I.R. 1959 S.C. 300; I = Union, States of A. P., Madras, M. P.
82. G. Nageshwara Rao v A. P. S. R. T. Corpn. A.I.R. 1959 S.C. 308; I = B. Samasankara Sastri.
83. C. I. T. v Teja Singh A.I.R. 1958 S.C. 352; I = Dalmia Jain Aviation Co. Ltd.
84. M. S. M. Sharma v Sri Krishna Sharma A.I.R. 1959 S.C. 395; I = Att. Gen. (represented by the Addl. Sol. Gen.).
85. D. S. Garewal v Punjab A.I.R. 1958 S.C. 512; I = Union.
86. Atma Ram v Punjab A.I.R. 1959 S.C. 519; I = Lal Singh and others
87. M/S D. S. & G. Mills Ltd. v Union A.I.R. 1959 S.C. 626; I = Amritsar Sugar Mills Ltd., Sir Shadi Lal Sugar and Gen. Mills Ltd., D. H. Sugar Factories and Oil Mills Ltd., Simbhaoli Sugar Mills Ltd., Sasamusa Sugar Mills Ltd., Ratna Sugar Mills Ltd., L. H. Sugar Mills Ltd., Lakshmi Khetan Sugar Mills Ltd., H. R. Sugar Factory Ltd., Motilal Padampat Singhania Ltd., Punjab Sugar Mills, Panniji Sugar and Gur Mills Ltd., Nawab Ganj Sugar Mills Ltd.

88. Kochunni v Madras A.I.R. 1959 S.C. 725; I = Union, Gopalan, T. Nair Kochunni Raja.
89. Commr. S. T. v H. Adamji & Co. A.I.R. 1959 S.C. 887; I = State of M. P.
90; Indian Home Pipe Co. v Workmen A.I.R. 1959 S.C. 1081; I = Hind Mazdoor Sabha.
91. Titaghur Paper Mills v Workmen A.I.R. 1959 S.C. 1095; I = Political Labour Organisations AITUC and INTUC
92. Bihar v R. B. H. R. M. L. Jute Mills A.I.R. 1960 S.C. 378; I = Indian Copper Corpn.
93. Kamdard Dawakhana v Union A.I.R. 1960 S.C. 554; I = All India Tibbi Conference.
94. J. V. Gokal & Co. v Asst. Coll. Sales Tax A.I.R. 1960 S.C. 593; I = Att. Gen. (represented by the Sol. Gen), Bombay Chamber of Commerce and Industry, Gill & Co. (P) Ltd., Eximport Trading Co., Bombay.
Note : Dr. R. M, Lohia v Supdt. Central Prison A.I.R. 1960 S.C. 633; Amicus curiae for the respondent.
95. Rohtas Sugar Ltd. v Mazdoor Seva Sangh A.I.R. 1960 S.C. 671; I = State of Bihar.
96. Mohd. Dastgir v Madras A.I.R. 1960 S.C. 756; I = Union.
97. Vishnu Sugar Mills v Workmen A.I.R. 1960 S.C. 812; I = State of Bihar.
98. B. T. Mfg. Co. v T. L. Assn. A.I.R. 1960 S.C. 833; I = State of Bombay.
99. Re Berubari Union A.I.R. 1960 S.C. 845; I = Union, State of W. B., K. K. Chatterjee, R. Roy, President Bhartiya Jan Sangh, Kerala, Secy Jan Sangh Mandi, T. S. Murthy of Akhil Jan Sanga of Visha-kapatnam, Secy Bharti Jan Sangh of Sitapur, Thaliparubhan Pattamb, Secy Jalpaiguri Development Party, Secy All India Forward Bloc of Calcutta, Nirmal Bose.
100. Rathi Singh Mfg. Co. v India A.I.R. 1960 S.C. 923; I = R. Ranchoddass
101. Re Sant Ram A.I.R. 1960 S.C. 923; I = Att. Gen. (represented by Sol. Gen.).
102. H. C. Narayan v Mysore A.I.R. 1960 S.C. 1073; I = D. R. Karigowda.
103. Kochunni v Madras A.I.R. 1960 S.C. 1080; I = K. C. Gopalan Unni, M. Moopil Nair.
104. U. P. v Deoman A.I.R. 1960 S.C. 1125; I = Att. Gen.
105. M. S. Sharma v Saree Krishna Sharma A.I.R. 1960 S.C. 1186; I = Att. Gen.
106. I. T. Commr. v Narsee Nagsee Co. A.I.R. 1960 S.C. 1231; I = Punjab Nat. Bank Ltd.
107. Madras v Noor Mohd. Co. A.I.R. 1960 S.C. 1254; I = Ambur Tanners Assn. R. Chenappa, P. Abdul Wahab.
108. B. C. Trivedi v N. N. Nagrashna A.I.R. 1960 S.C. 1292; I = Natvar Lal Nira Lal Talathi and others.
109. P. N. Datta v C. I. T. A.I.R. 1960 S.C. 1346; I = S. K. Datta
110. Anil Starch Ltd. v H. C. Workers Union A.I.R. 1960 S.C. 1346; I = United Planters Assn. of S. India.
111. Dir. R. D. v Corp. of Calcutta A.I.R. 1960 S.C. 1355; I = Union, States of Punjab, U. P., A. P., Madras, Bombay.
Note : Bombay v Kanaiya Lal A.I.R. 1961 S.C. 1 where there was an amicus curiae for the respondent.
112. W. B. v Naba Kumar A.I.R. 1961 S.C. 16; I = Gopalpur Land Dev. Soc. Ltd.
113. Universal Exports Agency v Chief Controller A.I.R. 1961 S.C. 41; I = B. S. & Co. French India Importing Corporation.

114. Nanavati v Bombay A.I.R. 1961 S.C. 112; I = C. B. Agarwala as amicus curiae.
115. Atiabari Co. Ltd. v Assam A.I.R. 1961 S.C. 232; I = Union, States of Bihar, Madras, Punjab, Rajasthan, U. P. and Mr. R. R. Krishna.
116. Jhandu Lal v Punjab A.I:R. 1961 S.C. 343; I = Att. Gen.
117. Dist. Board Ghazipur v Lakshmi Narain A.I.R. 1961 S.C. 356; I = District Board of Saharanpur, Muzzaffarnagar and Mr. G. K. Udyog.
118. Hingir Rampur Coal Co. v Orissa A.I.R. 1961 S.C. 459; I = Union (at the instance of the Court see pr. 8 p. 463-4).
119. Punjab v S. S. Singh A.I.R. 1961 S.C. 493; I = H. M. Seervai, Advocate General of Bombay.
120. Lt. Col. Khajoor Singh v Union A.I.R. 1961 S.C. 532; I = S. S. Lathar.
Note : Bombay v Apte A.I.R. 1961 S.C. 578 where there was an amicus curiae for the respondent.
Godse v Maharashtra A.I.R. 1961 S.C. 600 (at pr. 3 p. 601) where there was an amicus curiae for the appellant.
121. Birdhichand v 1st Civil Judge A.I.R. 1961 S.C. 644; I = State of Bombay.
122. Rameshwar Dayal v Punjab A.I.R. 1961 S.C. 816; I = Union, O. D. Sharma, B. D. Pathak.
123. M/S Ranchhoddas v Commr. A.I.R. 1961 S.C. 935; I = H. Sultan.
Note: A.I.R. Ltd. v R. D. Datar A.I.R. 1961 S.C. 943 where there was an amicus curiae for the respondent.
124. M/S G. S. Mills v K. T. S. Kamgar Sabha A.I.R. 1961 1016; I = Brihan Maharashtrian Sugar Syn. and another.
125. Bhau Ram v Baij Nath A.I.R. 1961 S.C. 1327; I = States of M. P. and Rajasthan.
126. Durgah Committee v Hussein Ali A.I.R. 1961 S.C. 1402; I = Att. Gen. (represented by Addl. Sol. Gen.).
127. Ashok Leyland Ltd. v Madras A.I.R. 1961 S.C. 1433; I = Tata Locomotive and Eng. Co.
128. Mahadeo v Bombay A.I.R. 1961 S.C. 1517; I = Vidarbha Kula Sewa Sangh of Phulumbri.
129. Jyoti Pershad v Delhi A.I.R. 1961 S.C. 1601; I = Phool Chand.
130. Ram Saran v Domini Kuer A.I.R. 1961 S.C. 1747; I = State of Punjab
131. General Manager, Southern Railway v Rangachari A.I.R. 1962 S.C. 36; I = G. Das.
132. Mohd. Hussain v Bombay A.I.R. 1962 S.C. 97; I = Ishwar Bhai Bechar Bhai and others.
133. A. I. B. E. Assn. v Nat. Ind. Trib. A.I.R. 1962 S.C. 171; I = Att. Gen. (who also represented the respondent); Punjab Nat. Bank Employees Assn., All India State Bank Staff Assn.
134. Chandrakant v Jasjit Singh A.I.R. 1962 S.C. 204; I = Tulsidas Khimji & Co.
135. M/S Raghubar Dayal v Union A.I.R. 1962 S.C. 263; I = M/S Gian Ram Suresh Chand.
136. Sakal Newspapers (P) Ltd. v Union A.I.R. 1962 S.C. 305; I = Shantilal H. Shah and others, Printers (Mysore) Pvt. Ltd., Firm Tamilnadu, B. N. Sarpotdar and another, and D. S. Potnis and another.
137. Saifuddin Saheb v Bombay A.I.R. 1962 S.C. 853; I = Hussein Kurban, Hussein Sanchwala. See pr. 7 p. 858-9.
138. Kedar Nath v Bihar A.I.R. 1962 S.C. 955; I = Att. Gen.
139. Basant Ram v Union A.I.R. 1962 S.C. 994; I = Budha Singh and others.
140. M/S Chotabhai v Union A.I.R. 1962 S.C. 1006; Multiple appeals where one respondent intervened in another appeal.

141. George Oakes (P) Ltd. v Madras A.I.R. 1962 S.C. 1037; I = States of A. P., Assam, Maharashtra, Punjab, Rajasthan.
142. Mat. Union of Comm. Employees v M. R. Meher A.I.R. 1962 S.C. 1080; I = Bombay Inc. Law Society.
143. Kameshwar Prashad v Bihar A.I.R. 1962 S.C. 1166; I = Union and Mr. E. X. Joseph.
144. Amarjit Singh v Punjab A.I.R. 1962 S.C. 1305; I = S. Singh, R. Singh.
145. Chunni Lal Mehta & Co. v C. S. & M. Co. Ltd. A.I.R. 1962 S.C. 1314; I = State of Maharashtra.
146. In the matter of "G" an advocate A.I.R. 1962 S.C. 1337; I = Att. Gen.
147. Automobile Transport Co. Ltd. v Rajasthan A.I.R. 1962 S.C. 1406; I = Att. Gen.,States of Assam, Madras, Punjab, Maharashtra, A. P., W. B., Bihar, Orissa, Gujerat, M. P., M. A. Tuloch Ltd., Nazeeria Motor Prince-Nellore, A. P. Motors Union.
148. Madan Gopal v Union A.I.R. 1962 S.C. 1513; I = Tata Iron & Steel Co. Ltd.
149. Laxman Balwant v Charity Commr. A.I.R. 1962 S.C. 1589; I = State of Maharashtra.
150. Ujjambai v U. P. A.I.R. 1962 S.C. 1621; I = States of Bihar, Tata Eng. and Locomotive Co. Ltd.
151. H. C. Calcutta v Amal Kumar A.I.R. 1962 S.C. 1704; I = States of M. P., Madras, Punjab, Rajasthan, Mysore, Uttar Pradesh.
152. M/S W. R. E. D. v Madras A.I.R. 1962 S.C. 1753; I = Madras State Electricity Board, State of A. P.
153. Waverly Jute Mills Co. Ltd. v Raymer & Co. Ltd. A.I.R. 1963 S.C. 90; I = Att. Gen.
154. Kali Pada v Union A.I.R. 1963 S.C. 134; I = Jharia Dist of Dhanbad.
155. Somawanti v Punjab A.I.R. 1963 S.C. 151; I = State of Gujerat.
156. Reg. Sett. Commr. v Sundardas Bhasim A.I.R. 1963 S.C. 181; I = Tolaram Tekchand.
157. W. B. v S. K. Ghosh A.I.R. 1963 S.C. 255; I = Att. Gen. (represented by Sol. Gen.).
158. Indramani v W. R. Natu A.I.R. 1963 S.C. 274; I = East India Cotton Assn.
159. C. C. Ajmer v B. Das A.I.R. 1963 S.C. 408; I = Union.
160. Kunj Behari Lal v Union A.I.R. 1963 S.C. 518; I = Union and three individuals.
161. M. B. S. Oushadhalaya v Union A.I.R. 1963 S.C. 622; I = N. C. Ghosh.
162. M. R. Balaji v Mysore A.I.R. 1963 S.C. 649; I = The Mysore Chathada Sri Vaishnava Assn., Mysore Arya Vysya Mahasabha of Bangalore.
163. Union v D. C. & G. Mills A.I.R.1963 S.C. 791; I = Hindustan Level Ltd.
164. S. M. Transport (P) Ltd. v Sankaraswamigal A.I.R. 1963 S.C. 864; I = State of Madras, New Theatre Carnatic Talkies.
165. Firm A. T. B. Mehta Majid & Co. v Madras A.I.R. 1963 S.C. 928; I = Union.
166. W. B. v Union A.I.R. 1963 S.C. 1241; I = State of M. P., Punjab, Assam, Orissa, Madras, Bihar, U. P., Rajasthan, Gujerat. See generally pr. 77.
167. New Central Jute Mills v W. B. A.I.R. 1963 S.C. 1307; I = States of A. P., M. P., and Maharashtra.
168. Re "P" an advocate A.I.R. 1963 S.C. 1313; I = Att. Gen. (represented by Sol. Gen.).
169. S. G. Prashar v Vasant Sen A.I.R. 1963 S.C. 1356; I = Hunger Ford Invest. Trust Ltd. (in liquidation).
170. K. S. Ramamurthy v C. L. Pondicherry A.I.R. 1963 S.C. 1464; I = Sivarama Reddiar.
Note: Jagir Kuar v Jaswant Singh A.I.R. 1963 S.C. 1521 where there was an amicus curiae for the appellant.

171. Re Sea Customs Act A.I.R. 1963 S.C. 1760; I = Union, States of A. P., Assam, Bihar, Maharashtra, Gujerat, Orissa, Kerala, Madras, Punjab, Rajasthan, W. B., M. P., U. P.
172. S. T. C. v Comm. T. Off. A.I.R. 1963 S.C. 1811; I = States of Madras, Punjab, W. B., Gujerat and Rajasthan.
173. Univ. of Delhi v Ram Nath A.I.R. 1963 S.C. 1873; I = J. D. Tyler, V. Saxena.
Note: A. P. v Venugopal A.I.R. 1964 S.C. 33 where there was an amicus curiae for the respondent.
174. Mohan Chowdhry v Chief Commr. A.I.R. 1964 S.C. 173; I = S. R. K. Vohra (another detenu).
Note : Sushil Kumar v D. M. A.I.R. 1964 S.C. 349 where there was an amicus curiae for the respondent.
175. Makhan Singh v Punjab A.I.R. 1964 S.C. 381; I = Att. Gen., States of Assam, Bengal, Bihar, M. P., Madras, Rajasthan, U. P., Orissa and 72 detenus.
176. Lakshmi Narain v 1st Addl. Judge A.I.R. 1964 S.C. 489; I = Miss A. Nihal Singh.
177. A. V. Thomas & Co. v Dty. Commr. A.I.R. 1964 S.C. 569; I = M/S Outcherloney Valley Estates (1938) Ltd., Coimbatore.
178. Punjab v O. G. B. Syndicate A.I.R. 1964 S.C. 669; I = 3 individuals.
179. U. P. v Mohd. Naim A.I.R. 1964 S.C. 703 ; I = C. J. and companion judges of the High Court appealed from (on notice).
180. Re Lily Isabel Thomas A.I.R. 1964 S.C. 855; I = Supreme Court judges.
181. Khyerbari Tea Estate v Assam A.I.R. 1964 S.C. 925; I = Desai and Parbuttia Co. Ltd.
182. R. Devi v Orissa A.I.R. 1964;S.C. 1195; I = 5 Maharajas.
183. R. L. Arora v U. P. A.I.R. 1964 S.C. 1231; I = Patel Mangal Bhai and others, Kaira Dist. Co-op. Milk Producers Union Ltd.
184. Orissa v M. A. Tullock Ltd. A.I.R. 1964 S.C. 1284; I = Mr. H. S. Murthy.
185. A. P. R. S. T. Corpn. v I. T. Corpn. A.I.R. 1964 S.C. 1486; I = Bihar S. R. T., North Bengal S. T. C., Calcutta S. T. C.
186. Krishnaswami v Madras A.I.R. 1964 S.C. 1515; I = States of M. P., Maharashtra, U. P., Rajasthan, Punjab.
187. B. Rajagopala v S. T. A. Tribunal A.I.R. 1964 S.C. 1573; I = Annamallais Bus Transport (P) Ltd.
188. Himansu Kumar v Jyoti Prakash A.I.R. 1964 S.C. 1636; I = Chief Justices of M. P., Patna, Gujerat.
189. I. T. Commr. v Mohd. Ali A.I.R. 1964 S.C. 1693; I = Aruna Mills Ltd.
190. Malyalam Plantations Ltd. v Dty. Commr. A.I.R. 1965 S.C. 40; I = M/S Outcherloney Valley Estates (1938) Ltd.
191. Madras v D. Namasivya A.I.R. 1965 S.C. 190; I = Neyveli Lignite Corpn., Union, States of Maharashtra and Rajasthan.
192. Poona Municipality v Dattarya A.I.R. 1965 S.C. 555; I = F. P. Shah.
193. Bisheshwar v University of Bihar A.I.R. 1965 S.C. 601; I = Univ. of Bihar, J. N. Sharma.
Note : Bhagwan Sarup v Maharashtra A.I.R. 1965 S.C. 682, amicus curiae for the appellant.
194. Re Article 143 A.I.R. 1965 S.C. 745; I = Att. Gen., Judges of the Allahabad High Court, Justice N. U. Beg, Justice Sehgal, U. P. Vidhan Sabha, Chief Justices of Maharashtra, Gujerat, Orissa, Rajasthan, M. P., Patna, Speakers of the Legislative Assemblies of W. B., Maharashtra, Gujerat, H. P., Assam, Nagaland, Bihar, Speaker of the Legislative Council of Maharashtra, Adv. Gens. of U. P., M. P., Madras, A. P., W. B., Rajasthan, Bihar, 2 individuals who were party to the events which triggered the controversy off, Bar Council of India, West India Advocates Assn., Allahabad High Court Bar Assn., Bar Assn. of India, Lok Raksha

Samaj, All India Civil Liberties Council, Sapru Law Society, Delhi Union of Journalists, Bihar Working Journalists Union, Institute of Public Opinion.

195. Sajjan Singh v Rajasthan A.I.R. 1965 S.C. 845; I = Maharashtra Sugar Mills, Belapur Co. Ltd., Rao Abhay Singh and others.
196. L. I. C. v S. V. Oak A.I.R. 1965 S.C. 975; I = R. N. Shah, Chandrashangir and others.
197. Roshan Lal v U. P. A.I.R. 1965 S.C. 991; I = R. B. Bansal.
198. Vajravelu v Sp. Dty. Coll. A.I.R. 1965 S.C. 1017; I = Att. Gen. States of Gujerat, Maharashtra, Rajasthan, M. P., and 2 individuals.
199. K. L. Johar & Co. v Dty. Comm. Tax Off. A.I.R. 1965 S.C. 1082; I = Att. Gen., States of A. P., M. P., U. P., Assam, Kerala, Rajasthan and Madras.
200. Jee Jee Bhoy v Asst. Coll. A.I.R. 1965 S.C. 1096; I = J. R. D. Tata, D. R. T. Tata, K. H. Cama, N. J. Gamadin.
201. Corpn. of Cal. v Liberty A.I.R. 1965 S.C. 1107; I = State of Assam, A. K. Mukerjea.
202. Jaipuria Bros. v U. P. A.I.R. 1965 S.C. 1213; I = K. Y. Pillaiah & Sons.
203. Channabasavaih v Mysore A.I.R. 1965 S.C. 1293; I = B. K. Kamrajiah.
204. I. T. Commr. v Ajax Products A.I.R. 1965 S.C. 1358; I = K. N. Guruswamy.
205. I. T. Commr. v M. K. Stremann A.I.R. 1965 S.C. 1494; I = M. Virchand
206. Mohd. Ayub Khan v Commr. Police A.I.R. 1965 S.C. 1623; I = Union.
207. Kamala Mills v Bombay A.I.R. 1965 S.C. 1942; I = M/S K. S. Venkataraman Ltd., States of Assam, Kerala, Gujerat, M. P., Rajasthan, U. P., W. B., A. P.,
208. Poon E. S. Co. v I. T. Commr. A.I.R. 1966 S.C. 30; I = Amalgamated Elect. Co. Ltd.
Note : Partha Sarthy v A. P. A.I.R. 1966 S.C. 38 where there was an amicus curiae for the appellant.
209. Jaora Sugar Mills v M. P. A.I.R. 1966 S.C. 416; I = Diamond Sugar Mills Ltd., Shri Chandgeo ~~Kart~~Sugar Mills Ltd., Sriram Shahkari Sakhar Karkhana Ltd., Parvana Sakhari Sakhar Karkhana Ltd., State of U. P.
210. W. B. v Nripendra Nath A.I.R. 1966 S.C. 447; I = S. S. Lodhi, M. Khan, States of Assam, Maharashtra, Madras, Orissa, Rajasthan, C. J. of Orissa.
211. Bundelkhand M. T. Co. v Behari Lal A.I.R. 1966 S.C. 455; I = M. P. State Roadways Transport Corpn.
212. A. M. Assn. etc. v Textile Labour A.I.R. 1966 S.C. 497; I = State of Gujerat, All India Manufacturers Organisation, I. N. T. U. C. (Trade Union body), All India Organisation of Industrial Employees, Mill Owners Assn. of Bombay, Saurashtra Mill Owners Assn., Hind Mazdoor Sabha.
213. Singrami Collieries Co. v C. I. T. A.I.R. 1966 S.C. 563; I = Att. Gen., State of M. P., Amal. Coalfields Ltd., Panch Valley Coal Co., Perfect Pottery Co. Ltd.
214. S. M. Mills Co. v Baliram A.I.R. 1966 S.C. 616; I = Babu Lal.
215. Anand v Chief Secy. Madras A.I.R. 1966 S.C. 657; I = States of Bihar, Punjab, Tripura, Makhan Singh and 13 others.
216. Hapur Municipality v Raghuvendra A.I.R. 1966 S.C. 693; I = States of U. P., Madras, Rajashtan, M. P.
217. A. K. Gopalan v Union A.I.R. 1966 S.C. 816; I = C. H. Kannan, Viswanatha Menon.

218. Bombay Labour Union v M/S International Franchises Ltd. A.I.R. 1966 S.C. 942; I = Committee for the Defence of Working Women's Rights, Maharashtra State Pharmaceuticals Employees' Federation.
219. S. C. Asst. Coll. of Customs v Sitaram A.I.R. 1966 S.C. 955; I = P. R. Baldota.
220. Yagnapurushdasji v Mulidas A.I.R. 1966 S.C. 1119; I = Adv. Gen. of Maharashtra.
221. I. T. O. v Bachulal A.I.R. 1966 S.C. 1148; I = K. Ram.
222. Amritsar Sugar Mills v C. S. T. A.I.R. 1966 S.C. 1212; I = Lord Krishna Sugar Mills Ltd.
223. C. I. T. v Shahzada Nand & Sons A.I.R. 1966 S.C. 1342; I = Bhutani Bros (P) Ltd., and 4 individuals.
224. Cumbum Roadways Ltd. v Somu Transport Ltd. A.I.R. 1966 S.C. 1366; I = P. N. Swami Naidu & Co., A. B. T. Co.
225. Bihar v Rambalak Singh A.I.R. 1966 S.C. 1441; I = Att. Gen.
226. Rao Nihalkaran v Ram Gopal A.I.R. 1966 S.C. 1485; I = 2 individuals.
227. G. Buddana v I. T. Commr. A.I.R. 1966 S.C. 1523; I = Behari Lal Kanhaiya Lal.
228. Gotan Lime Syndicate v I. T. Commr. A.I.R. 1966 S.C. 1564; I = Dalmia Cement (Bharat) Ltd., Cement Mnfg. Assn., Moolchand Sharma.
229. M. P. v Vishnu Prashad A.I.R. 1966 S.C. 1593; I = U. P. State Industrial Corpn.
230. Kulathil v Kerala A.I.R. 1966 S.C. 1614; I = Att. Gen. (represented by the Addl. Sol. Gen.).
231. Sri Sita Ram Sugar Mills v Workmen A.I.R. 1966 S.C. 1670; I = State of U. P.
232. Badaku Joti v Mysore A.I.R. 1966 S.C. 1746; I = Att. Gen.
233. Ram Chandra v U. P. A.I.R. 1966 S.C. 1889; I = Att. Gen.
234. M. P. v Shobharam A.I.R. 1966 S.C. 1910; I = States of Madras, Kerala and Gujerat.
235. B. N. Bagarajan v Mysore A.I.R. 1966 S.C. 1942; I = L. V. Shinde.
236. Chandra Mohan v U. P. A.I.R. 1966 S.C. 1987; I = R. N. Upadhyaya.
237. Nagaland v Ratan Singh A.I.R. 1967 S.C. 212; I = State of Assam
238. P. L. Lakhanpal v Union A.I.R. 1967 S.C. 243; I = C. D. Agarwal (as amicus curiae).
239. D. D. Kapadia v C. I. T. A.I.R. 1967 S.C. 614; I = Trustees of the estate of the late F. E. Dinshaw.
240. Jalan Trading Co. v Mazdoor Sabha A.I.R. 1967 S.C. 691; I = Att. Gen., Hind Mazdoor Sabha; Hind Mazdoor Panchayat; New Mill Co. Ltd.; Textile Labour Union; Alta Laboratories Ltd.; Himabhai Mfg. Co. Ltd.; New Swadeshi Mill; Glass Ind. Syn; Calico Mills Chemicals and Plastic Diviwions, A.I.T.U.C. (a Trade Union body); Mills Owners Assn.; Bombay Gas Co.; Tata Oil Mills Ltd.; Textile Lab. Assn.; New Manek Chand Spg. and Wvg. Co. Ltd.; Jay Bharat Cotton Mfg. Ltd.; Arvind Mills Ltd.; Ahemdabad New Cotton Mills Ltd.
241. Hindustan Antibiotics v Workmen A.I.R. 1967 S.C. 948; I = Saurashtra Vidya Kamdar Sangh; Workmen of Kerala State Electricity Board.
242. Rajalakshmiah v Mysore A.I.R. 1967 S.C. 993; I = Mr. M. Reddy.
243. W. B. v Corpn. of Calcutta A.I.R. 1967 S.C. 997; I = Adv. Gens for Madras, Kerala, U. P., M. P., Rajasthan.

244. Punjab v Gurjit Singh A.I.R. 1967 S.C. 1214; I = Att. Gens for Kerala, Gujerat, U. P., Assam, Madras, W. B.
245. Maneklal Chhotalal v M. G. Makwana A.I.R. 1967 S.C. 1373; I = Adv. Gen. for Maharashtra.
246. Jaisinghani v Union A.I.R. 1967 S.C. 1427; I = Asst. Commr. of Income Tax.
247. Prem Nath v Rajasthan A.I.R. 1967 S.C. 1599; I = State of U. P., P. K. Malhotra, Chandra Mohan, H. C. Agarwal.
248. Golak Nath v Punjab A.I.R. 1967 S.C. 1643; I = Att. Gen., States of W. B., Bihar, Madras, Gujerat, U. P., Kerala, Assam, Rajasthan, A. P., Maharashtra, 9 individuals, 4 Sugar Mills and 1 Company.
249. Inder Singh v Punjab A.I.R. 1967 S.C. 1777; I = P. Singh, K. Singh.
250. Satwant Singh v A. P. O. Delhi A.I.R. 1967 S.C. 1837; I = C. V. Jethwani.
251. Board of Revenue v R. S. Jhaver A.I.R. 1968 S.C. 51; I = State of Kerala.
252. Kalawati Devi v C. I. T. A.I.R. 1968 S.C. 162; I = D. D.Tulshan, U. Mohata.
253. M. M. Ipoh v C. I. T. A.I.R. 1968 S.C. 317; I = Att. Gen. (by notice).
254. Union v Kamalbhai A.I.R. 1968 S.C. 377; I = 2 interveners.
255. Kerala v Cochin Coal Co. A.I.R. 1968 S.C. 389; I = E. J.Mathur.
256. Kantilal Babulal & Bros. v H. C. Patel A.I.R. 1968 S.C. 445; I = New Shorrock Spg. & Mfg. Co. Ltd.
257. I. S. W. Products Ltd. v Madras A.I.R. 1968 S.C. 479; I = Adv. Gen. of W. B.
258. C. M. Rajendram v Union A.I.R. 1968 S.C. 507; I = Central Govt. Sch. Tribes Welfare Assn. and 2 individuals.
259. Straw Products v I. T. Commr. A.I.R. 1968 S.C. 579; I = Att. Gen.
260. Andhra Sugar Ltd. v A.P. A.I.R. 1968 S.C. 599; I = Basti Sugar Mills Ltd.
261. I. T. Commr. v Lawrence Singh A.I.R. 1968 S.C. 658; I = Treasury Office of Nagaland.
262. Baburao v Zakir Hussain A.I.R. 1968 S.C. 904; I = Att. Gen. (by notice), Election Commr., Returning Officer for the Presidential Election.
263. S. B. Sugar Mills Ltd. v Union A.I.R. 1968 S.C. 922; I = Tata Chemicals Ltd.
264. M. S. E. Board v Kalyan Municipality A.I.R. 1968 S.C. 991; I = Att. Gen. Jagatjit Cotton Textile Mills Ltd.
265. W. U. P. E. Power & Supply Co. Ltd. v U. P. A.I.R. 1968 S.C. 1099; I = Hind Lamps Ltd.
266. Udai Ram v Union A.I.R. 1968 S.C. 1138; I = J. M. Gandhi.
267. Delhi Municipality v B. G. S. W. Mills A.I.R. 1968 S.C. 1232; I = Delhi Cloth Mills Ltd., Arvind Mills, Mun. Corpn of Ahemadabad, Broach Borough Municipality, Shri Prithvi Cotton Mills Ltd., Broach Textile Mills (P) Ltd.
268. A. P. v P. Sagar A.I.R. 1968 S.C. 1379; I = G. Latchanna.
269. Maharashtra v Madhavrao A.I.R. 1968 S.C. 1395; I = Mr. Onkarnath, S. Pandey, S. H. Shah.
270. Sudhir Chandra v W. T. O. A.I.R. 1969 S.C. 59; I = States of Assam, Kerala, U. P.
271. Madras v Natraja Mudaliar A.I.R. 1969 S.C. 147; 10 interveners including Sitalakshmi Mills Ltd.
272. Debarat v State A.I.R. 1969 S.C. 189; I = Calcutta High Court.

273. Jaganath Rao v Orissa A.I.R. 1969 S.C. 215; I = State of Bihar, B. Patnaik.
274. Rajasthan v Karam Chand & Bros. A.I.R. 1969 S.C. 343; I = Adv. Gen. of W. B.
275. Kerala v Haji K. Kutty A.I.R. 169 S.C. 378; I = Malanker Rubber Produce Co. Dtd.
276. W. Proost v Bihar A.I.R. 1969 S.C. 465; I = Rev. Fthr. Mathias, Gabriel D'Costa, Francis Kujur, Marcel Baxla, A. Purty.
277. Metal Box Co. v Workmen A.I.R. 1969 S.C. 612; I = Steel Mazdoor Sabha of Bombay, Indian Oxygen Ltd., Kapra Mazdoor Electrical Union, Ass. Cement Co., G. E. C. Ltd., Indian Sugar Mills Assn.
278. R. M. Seshadri v G. V. Paix A.I.R. 1969 S.C. 692; I = Dist. Elec. Off. of Madras.
279. S. V. P. Trust v Basant Ram A.I.R. 1969 S.C. 1273 ; I = Mr. Duli Chand.
280. Pankaj Kumar v W. B. A.I.R. 1970 S.C. 97; I = Mr. Kaka Ram and 6 others.
281. Indu Bhushan v Ram Sundari A.I.R. 1970 S.C. 228; I = Att. Gen. (by notice).
282. U. P. Electric Supply Co. v R. K. Shukla A.I.R. 1970 S.C. 237; I = Att. Gen. (by notice).
283. A. V. S. N. Rao v A. P. A.I.R. 1970 S.C. 422; I = A. P. Non-Gazetted Officers' Assn. A. P. Secretariat Assn.
284. Rayala Corpn. v Director of Enforcement A.I.R. 1970 S.C. 494; I = Adv. Gen. of Tamil Nadu.
285. R. C. Cooper v Union A.I.R. 1970 S.C. 564; I = States of J. K., Maharashtra, Bihar, Kerala, A. P., Orissa, Tamil Nadu.
286. S. T. Commr. v M. P. E. B. Jabalpur A.I.R. 1970 S.C. 732; I = The National Newsprint and Paper Mills Ltd.
287. Hansraj v H. H. Dave A.I.R. 1970 S.C. 755; I = M/S Shree Agency, M/S Lokenath Tolaram, Prakash Cotton Mills Pvt. Ltd.
288. Asst.Customs Collector, Bombay v L. R. Melwani A.I.R. 1970 S.C. 962 I = B. M. Damania.
289. Second G. T. O. v D. H. Hazareth A.I.R. 1970 S.C. 999; I = States of U. P., Kerala, W. B., Tamil Nadu, Bihar, M. P., Mysore, Assam.
290. J. K. (Bom.) (P) Ltd. v New-Kaiser-i-Hind Spg. & Wvg. Co. A.I.R. 1970 S.C. 1041; I = M/S Juggilal Kamlapat (Bankers) and other creditors.
291. Illias v Collector of Customs A.I.R. S.C. 1065; I = B. M. Damania.
292. Sampat Prakash v J. K. A.I.R. 1970 S.C. 1118; I = S. K. B. Rahman, Nizamuddin and others.
293. Baijnath v Bihar A.I.R. 1970 S.C. 1436; I = Dhalbham Trades and Industries Ltd.
294. J. R. G. Mfg. Assn. v Union A.I.R. 1970 S.C. 1589; I = Indian Rubber Works.
295. Union v Shreeram Durga Prashad A.I.R. 1970 S.C. 1597; I = Orissa Minerals Dev. Co. Ltd., Bird Y Co. (P) (1930) Ltd., Bachar Gray & Co. Ltd., Duncan Bros. & Co. Ltd., Louis Dreyfus & Co. Ltd., Mcleod & Co. Ltd., Bunge & Co. Ltd., Jay Eng. Works Ltd., S. K. Ghosh.
296. Rattan Lal and Co. v Assessing Authority A.I.R. 1970 S.C. 1742; I = Pradip Kumar and others.
Note : Re P. C. Sen A.I.R. 1970 S.C. 1821 (a contempt of Court case) where all the judges of the Calcutta High Court are represented.
297. M. S. R. T. Corpn. v B. G. R. M. Service, Warora A.I.R. 1970 S.C. 1926; I = Stateof Maharashtra.

298. C. B. Boarding & Lodging v Mysore A.I.R. 1970 S.C. 2042; I = In an associated appeal the appellant in the case cited here.

299. V. Venugopala v I. T. Commr. A.I.R. 1970 S.C. 2051; I = A. K. Antharjanam.

300. S. K. Singh v. V. V. Giri A.I.R. 1970 S.C. 2097; I = Att. Gen., Election Comm. of Indian, Returning Officer Presidential Election.

Addendum

301. Shyam Behari v M. P. A.I.R. 1965 S.C. 427; I = Kaira Dist. Co-op Milk Producers Union Ltd.

Note : Case 301 should come after Case 191.

Appendix II : Tables showing the institution and disposal of cases before the Supreme Court of India 1960 to January 1972

Sources :

Table I

Extracted from K. Subba Rao : Some Constitutional Problems (1970) 242-3.

Tables 2 - 8.

Supplied by the Registrar of the Supreme Court by the courtesy of Mr. Justice S. M. Sikri, Chief Justice of India.

Tables 9 - 10.

Supplied by Mr. Justice M. H. Beg, Puisne Judge, Supreme Court of India.

Table 1

Statement showing filing & Disposal (Special Leave Petitions-Civil & Criminal) for the year 1961-66.

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ure	Year	No. pending on the 1st day of the year.	Filings	Total of 1 & 2.	Disposal.	Pending at the end of the year.	Average disposal
cial	1961	96	1030	1126	954	172	80
ve	1962	172	1224	1396	1243	153	104
itions	1963	153	1237	1390	1221	169	101
vil)	1964	169	1456	1625	1405	220	117
	1965	220	1370	1590	1423	167	118
	1966	167	1489	1656	1409	247	117
cial	1961	81	970	1051	945	106	78
ve	1962	106	990	1096	1048	48	87
itions	1963	48	952	1000	931	69	77
iminal)	1964	69	1088	1157	1058	99	88
	1965	99	996	1095	1021	74	85
	1966	74	885	959	864	95	72

large number of filings shown in the year 1966 was due to the new hod of numbering the appeals. Before that year, the appeal was given r when the appeal petition was filed after the records where made ready the High Court and transmitted to the Supreme Court. But from 1966, year of the granting of the leave was given to effect.

STATEMENT SHOWING FILING & DISPOSAL FOR THE YEARS 1961-1966.

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vil	1961	1356	633	1989	907	1082	76
eals.	1962	1082	891	1973	889	1084	74
	1963	1084	1109	2193	797	1396	66
	1964	1396	1115	2511	1055	1456	88
	1965	1456	1184	2640	1049	1591	87
	1966	1591	2503	4094	971	3123	91
minal	1961	384	197	581	216	365	18
	1962	365	215	580	309	271	25
	1963	271	218	489	152	337	13
	1964	337	273	610	256	354	21
	1965	354	195	549	161	388	13
	1966	388	243	631	226	405	19
t Petitions.	1961	399	384	783	531	252	44
	1962	252	239	491	344	147	29
	1963	147	234	381	182	199	15
	1964	199	132	331	294	37	24
	1965	37	185	222	160	62	13
	1966	66	387	449	336	113	28

SUPREME COURT OF INDIA

Table 2 STATEMENT OF INSTITUTION, DISPOSAL AND PENDENCY FOR THE YEAR 1965.

Sr.No.	Particulars	Pending at the beginning of the year	Instituted during the year	Disposed of during the year	Pending at the end of the year
1.	Ordinary Civil Appeals	1228	1067	890	1405
2.	Constitutional Civil Appeals	228	117	159	186
3.	Ordinary Criminal Appeals	336	171	152	355
4.	Constitutional Criminal Appeals	18	24	9	33
5.	Art. 32 Petitions for final Hearing	37	67	70	34
6.	Special Leave Petitions (Civil)	220	1370	1423	167
7.	Special Leave Petitions (Criminal)	99	996	1021	74
8.	Art. 32 Petitions for Preliminary Hearing	-	118	90	28
	Total:	2166	3930	3814	2282

SUPREME COURT OF INDIA

Table 3

STATEMENT OF INSTITUTION, DISPOSAL AND PENDENCY FOR THE YEAR 1966.

S.No.	Particulars	Pending at the beginning of the year	Instituted during the year	Disposed of during the year	Pending at the end of the year
1.	Ordinary Civil Appeals	1405	1839	689	2555
2.	Constitutional Civil Appeals	186	664	282	568
3.	Ordinary Criminal Appeals	355	166	185	336
4.	Constitutional Criminal Appeals	33	77	41	69
5.	Art. 32 Petitions for final hearing	34	122	58	98
6.	Special Leave Petitions (Civil)	167	1488	1408	247
7.	Special Leave Petitions (Criminal)	74	885	864	95
8.	Art. 32 Petitions for Preliminary Hearing.	28	266	279	15
	Total:	2282	5507	3806	3983

SUPREME COURT OF INDIA

Table 4 STATEMENT OF INSTITUTION, DISPOSAL & PENDENCY FOR THE YEAR 1967.

Sl. No.	Particulars.	Pending at the beginning of the year.	Instituted during the year.	Disposed of during the year.	Pending at the end of the year.
1.	Ordinary Civil Appeals	2555	1538	930	3163
2.	Constitutional Civil Appeals	568	398	127	839
3.	Ordinary Criminal Appeals.	336	262	177	421
4.	Constitutional Criminal Appeals	69	-	56	13
5.	Article 32 Petitions for final hearing	98	178	163	113
6.	Special Leave Petitions (Civil)	247	1439	1362	324
7.	Special Leave Petitions (Criminal)	95	1092	1040	147
8.	Article 32 Petitions for Preliminary hearing.	15	295	291	19
	TOTAL :	3983	5202	4146	5039

SUPREME COURT OF INDIA

Table 5 STATEMENT OF INSTITUTION, DISPOSAL & PENDENCY FOR THE YEAR 1968

Sl. No.	Particulars.	Pending at the beginning of the year.	Instituted during the year.	Disposed of during the year.	Pending at the end of the year.
1.	Ordinary Civil Appeals	3163	1647	1269	3541
2.	Constitutional Civil Appeals	839	934	1105	668
3.	Ordinary Criminal Appeals	421	290	248	463
4.	Constitutional Criminal Appeals	13	2	15	-
5.	Article 32 Petitions for final hearing	113	214	239	88
6.	Special Leave Petitions (Civil)	324	1883	1890	317
7.	Special Leave Petitions (Criminal)	147	1162	1092	217
8.	Article 32 Petitions for Preliminary hearing.	19	444	370	93
	TOTAL :	5039	6576	6228	5387

SUPREME COURT OF INDIA

Table 6 STATEMENT OF INSTITUTION, DISPOSAL & PENDENCY FOR THE YEAR 1969

Sl. No.	Particulars.	Pending at the beginning of the year.	Instituted during the year.	Disposed of during the year.	Pending at the end of the year.
1.	Ordinary Civil Appeals	3541	2354	1705	4190
2.	Constitutional Civil Appeals	668	358	341	685
3.	Ordinary Criminal Appeals	463	258	219	502
4.	Constitutional Criminal Appeals	-	4	1	3
5.	Article 32 Petitions for final hearing	88	365	279	174
6.	Special Leave Petitions (Civil)	317	2503	2287	533
7.	Special Leave Petitions (Criminal)	217	1144	1252	109
8.	Article 32 Petitions for Prel. hearing	93	538	557	74
	TOTAL:	5387	7524	6641	6270

SUPREME COURT OF INDIA

Table 7 — STATEMENT OF INSTITUTION, DISPOSAL & PENDENCY FOR THE YEAR 1970.

Sl. No.	Particulars	Pending at the beginning of the year.	Instituted during the year.	Disposed of during the year.	Pending at the end of the year
1.	Ordinary Civil Appeals	4190	1928	1212	4906
2.	Constitutional Civil Appeals	685	385	540	530
3.	Ordinary Criminal Appeals	502	229	196	535
4.	Constitutional Criminal Appeals	3	5	5	3
5.	Article 32 Petitions for final hearing	174	286	254	206
6.	Special Leave Petitions (Civil)	533	2444	2174	803
7.	Special Leave Petitions (Criminal)	109	1173	1243	39
8.	Article 32 Petitions for Prel. hearing	74	656	648	82
	TOTAL :	6270	7106	6272	7104

SUPREME COURT OF INDIA

Table 8 STATEMENT OF INSTITUTION, DISPOSAL AND PENDENCY FOR THE YEAR 1971.

Sr.No.	Particulars	Pending at the beginning of the year.	Instituted during the year.	Disposed of during the year.	Pending at the end of the year.
1.	Ordinary Civil Appeals	4906	1913	1233	5592
2.	Constitutional Civil Appeals	530	156	204	482
3.	Ordinary Criminal Appeals	535	321	271	585
4.	Constitutional Criminal Appeals	3	17	18	2
5.	Art. 32 Petitions for final Hearing	206	228	177	257
6.	Special Leave Petitions (Civil)	803	3614	3012	1405
7.	Special Leave Petitions (Criminal)	59	1255	1129	185
8.	Art. 32 Petitions for Preliminary Hearing	82	469	447	104
	Total	7104	7979	6491	8592

Table 9 STATEMENT FOR TH' MONTH OF DECEMBER, 1971.

'R' for Ready.
'NR' for Not Ready.
'D' for Dismissed.
'G' for Granted.

S. NO.	Particulars.	Pending from last month. 'R'	Pending from last month. 'NR'	Instituted during the month and rule granted during the month.	Disposed of during the month.	Pending at the end of month. 'R'	Pending at the end of month. 'NR'	No. of C. A. Vs.	Number over 3 Year 'R'	Number over 3 Year 'NR'	2Yrs.	1Yr.
1.	Ordinary Civil Appeals.	1460	4015	172	55	1561	4031	35	803	314	2420	3677
2.	Constl. Civil Appeals.	124	355	15	12	117	365	43	73	6	164	344
3.	Ordinary Crl.Appeals.	116	469	18	18	149	436	5	10	9	114	171
4.	Constl. Crl.Appeals.	1	1	-	-	1	1	-	-	-	-	-
5.	Art. 32 Petitions Hebeas Corpus & Ors. for final hearing.	174	125	13	55	175	82	11	6	-	32	140
	'A' TOTAL:	1875	4965	218	140	2003	4915	94	892	329	2730	4332
6.	Spl. Leave Petitions Civil.	1381	39	160 'G' 85 + 'D' 90 =	175	*1355	50	-	3	-	6	16
	Crl.	138	12	91 59 + 17 =	76	149	16	-	-	-	-	-
7.	Art.32 Petitions for Preliminary Hearing.	112	9	19 13 + 23 =	36	91	13	-	-	-	-	-
	'B' TOTAL:	1631	60	270 157+130 =	287	1595	79	-	3	-	6	16
	GRAND TOTAL 'A' & 'B'	3506	5025	488	427	3598	4994	94	895	329	2736	4348

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A group of 784 out of these petitions were directed to be posted for hearing after the disposal of certain Writ Petitions pending in the High Court.

Table 10

STATEMENT FOR THE MONTH OF JANUARY, 1972

'R' for Ready.
'NR' for Not Ready.
'D' for Dismissed.
'G' for Granted.

S. No.	Particulars.	Pending from last month. 'R'	Pending from last month. 'NR'	Instituted during the month and rule granted during the month.	Disposed of during the month	Pending at the end of month. 'R'	Pending at the end of month. 'NR'	No. of C. A. vs.	Number over 3 Yrs. 'R'	Number over 3 Yrs. 'NR'	Number over 2 Yrs.	Number over 1 Yr.
1.	Ordinary Civil Appeals.	1561	4031	129	109	1592	4020	40	836	356	2433	3657
2.	Constl. Civil Appeals.	117	365	-	1	142	339	45	43	7	198	352
3.	Ordinary Crl. Appeals.	149	436	32	30	135	452	7	6	9	107	175
4.	Constl. Crl. Appeals.	1	1	-	-	2	-	-	-	-	-	-
5.	Art.32 Petitions Hebeas Corpus & Ors. for final hearing.	175	82	22	18	180	81	19	6	-	32	148
'A' TOTAL:		2003	4915	183	158	2051	4892	111	891	372	2770	4332
				'G' 'D'								
6.	Spl. Leave Petitions Civil	1355	50	243 57 + 181	= 238	1362	48	-	3	-	6	21
	Crl.	149	16	103 31 + 117	= 148	108	12	-	-	-	-	-
7.	Art.32 Petitions for Preliminary Hearing.	91	13	25 22 + 7	= 29	87	13	-	-	-	-	-
'B' TOTAL:		1595	79	371 110 + 305	=415	1557	73	-	3	-	6	21
GRAND TOTAL 'A' & 'B' :		3598	4994	554	573	3608	4965	111	894	372	2776	4353

Case List

Ameer-un-nissa Begum v Mahboob Begum A.I.R. 1953 S.C. 91
Aminah v Suptd. Prison, Kelantan (1968) 1 Mal. L. Jnl. 92
Amrit Lal v Jayanti Lal A.I.R. 1960 S.C. 964
Anand v Chief Sect A.I.R. 1966 S.C. 657
Ananda Behera v Orissa A.I.R. 1956 S.C. 17
Anand Brahma v U. P. A.I.R. 1967 S.C. 1091
Anant v Baburao A.I.R. 1967 Bom. 109
Anant v Bombay A.I.R. 1960 S.C. 500
Anant Prashad v A. P. A.I.R. 1963 S.C. 891
Anant v Shankar A.I.R. 1943 P.C. 196
Angurbala v Debabrata A.I.R. 1951 S.C. 293
Anil Starch Ltd. v Workers' Union A.I.R. 1960 S.C. 1346
Anisminic Ltd. v Foreign Compensation Administration (1969) 2 A.C. 147
Anjaneyulu v Rang Charyuly A.I.R. 1958 A.P. 705
Ankin v L. N. R. Rly (1930) 1 K.B. 527
Ankush Narayan v Janabai (1965) 67 Bom. L. R. 864
Annamalai v Sundarathammal A.I.R. 1953 Mad. 404
Anthony v Anthony (1919) 35 T.L.R. 559
Anthonyswamy v M. R. Chinnaswamy (1970) II S.C.R. 648
A. P. v Sagar A.I.R. 1962 S.C. 1379
Apaji v Ramchandra (1892) 16 Bom. 29
A. Periakaruppan v Tamil Naidu A.I.R. 1971 S.C. 2303
R. Perumalakkal v Mumaresen A.I.R. 1967 S.C. 569
Apparao v Syryaprakash (1951) 1 M.L.J. 526
Approvier v Rama Subbayan (1866) 11 M.I.A. 75
Arjun Singh v Virendranath A.I.R. 1971 All. 129
Armugha Udayar v Valliammal A.I.R. 1969 Mad. 72
A. Rodericks v Maharashtra A.I.R. 1967 S.C. 1788
Arrowsmith v Jenkins (1963) 2 Q.B. 561
Arun Ghosh v W. B. A.I.R. 1970 S.C. 1228
Ashiq Miyan v M. P. A.I.R. 1969 S.C. 4.
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